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Northwestern University School of Law

THE FEDERAL REPORTER.

VOL. 4.

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

OCTOBER—DECEMBER, 1880.

PEYTON BOYLE, EDITOR.

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CASES
ARGUED AND DETERMINED
IN THE
United States Circuit and District Courts

SOUTHWORTH *v.* ADAMS and others.

(Circuit Court, E. D. Wisconsin. October 18, 1880.)

1. JURISDICTION—WILLS—REMOVAL ACT OF 1875.—By the law of Wisconsin, at the time this action was begun, jurisdiction to establish lost wills was vested in the circuit courts of the state and not in the probate courts. In an action brought in the state court by an alleged legatee under a lost will, against the sole heir at law, to establish the will, and removed to the federal court under the removal act of 1875, the parties being citizens of different states, *held*, that although the federal court might not have jurisdiction of such an action, if originally brought in that court, the case was removable under the act, and that, after it was transferred to the federal court, that court had jurisdiction of the same.

See *Gaines v. Fuentes et al.* 2 Otto, 10.

Mr. Cassoday and *Mr. Paige*, for complainant.

Mr. Weeks and *Mr. Lillibridge*, for defendant.

DYER, D. J. This is an action originally brought in the state court to establish an alleged lost will of Richard De Forest, deceased, and removed to this court at the instance of the defendant. The complainant is a citizen of the state
v.4,no.1—1

of Iowa, and claims to be a legatee under the alleged will. The defendant Jane N. Adams is a citizen of the state of Michigan, and the sole heir at law of De Forest. The estate of deceased was situated in this state, and was being administered upon in the probate court of Walworth county, as the estate of an intestate, when this action was brought. The administrator is a party to the action with the heir at law, but the controversy is between complainant and the defendant Jane N. Adams. As the pleadings in the action originally conformed to the practice under the State Code, and as the suit is one in equity, after the removal of the cause to this court the pleadings were reframed so as to conform to the requirements of the practice in chancery; and the prayer of the bill is "that proof be taken of the execution and validity of the said last will and testament; * * * and that the said will be established and adjudged as the last will and testament of the said Richard De Forest." Issue was joined by answer duly filed, and the case has proceeded here to the extent of taking the testimony. A motion is now made by complainant to remand the case to the state court.

The general ground of the motion is that this court has not jurisdiction of the subject-matter of the action. And in support of the motion it is urged that the purpose of the action is to obtain probate of a lost will; that the federal court, like the court of chancery of England, has not and never had jurisdiction of the probate of wills, that jurisdiction being vested exclusively in the courts of the state, upon which is devolved, by statute, the administration of estates; that a proceeding to probate a will is in the nature of a proceeding *in rem*, not necessarily involving a controversy between parties, and that therefore the present action is not a "suit of a civil nature at law or in equity," nor a "controversy between citizens of different states," within the meaning of section 2, art. 3, of the constitution, nor of the removal act of March 3, 1875, under which the cause was removed to this court. It has been held by the supreme court that the federal courts have no probate jurisdiction. This has been directly or incidentally declared in cases where an attempt was made to compel payment of a bequest under a will not admitted to probate,

or to set aside a will for fraud or imposition, or to set aside the probate thereof on the ground of mistake, fraud, or forgery. And in one of the cases it was said, that whatever the cause of the establishment of the doctrine that a bill in equity will not lie to set aside a will or its probate, "there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts." The cases in which the question in its different phases has arisen or been discussed, are *Armstrong v. Lear Adm'r, etc.*, 12 Wheat. 169; *Tarver v. Tarver*, 9 Pet. 174; *Gaines v. Chew*, 2 How. 619; *Fouvergne et al. v. New Orleans et al.* 18 How. 470; *Gaines v. New Orleans*, 6 Wall. 642, 703; *Case of Broderick's Will*, 21 Wall. 503; and *Gaines v. Fuentes et al.* 92 U. S. 10. With the exception of the case last cited, all of these were cases originally brought in the federal courts, thus presenting the question of original jurisdiction of those courts to entertain bills of the nature before indicated. But that is hardly the question here presented. For, even if the present bill could not have been filed as an original proceeding in this court, the question is whether this was not, when pending in the state court, a suit in equity in which there was a controversy between citizens of different states, and whether, after removal of the same under and pursuant to the removal act of 1875, this court was not then invested with jurisdiction of the cause.

As appears from several of the cases cited, the denial of general equity jurisdiction to entertain causes involving the probate of wills is made to rest largely upon the fact that such jurisdiction is exclusively vested in the probate courts, and in some of the cases, as in that of *Broderick's Will*, this point is enforced by reference to state statutes which lodge such jurisdiction in the probate courts. It was, however, a peculiarity of the law of Wisconsin, when this action was commenced, that by statute jurisdiction to establish a lost will was vested in the circuit courts of the state, and, by implication, the probate courts, in that particular class of cases, had not jurisdiction. The statute provided that "whenever any will of real or personal estate shall be lost, or destroyed by accident

or design, the circuit court shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds;" and no statute at that time conferred such power upon the probate court. The complainant was, therefore, compelled to institute her proceeding to establish the alleged lost will in the circuit court of the state, and from that court all causes may be removed to this court which are made removable by the acts of congress.

Now it is true that the ordinary statutory proceeding to probate a will to some extent partakes of the nature of a proceeding in *rem*, because all parties interested are cited to appear, and because it does not of necessity involve a controversy between the parties. But, in the case at bar, a legatee under the alleged will is seeking, by action against the sole heir at law, to establish the will. The proceeding is in form and substance a suit. There is an issue between the two parties involving the execution, existence, and validity of the supposed will; the one party contending for her rights as a legatee, and the other for her rights as the only heir at law. Of necessity the controversy had to assume the usual form of a suit between hostile parties in the state court, and, as the probate court had not jurisdiction of the subject-matter, the proceeding was necessarily instituted in a court of general jurisdiction in the state, where the statute lodged jurisdiction to establish lost wills "as in the case of lost deeds." Now was not this, when it was pending in the state court, a suit of a civil nature, in equity, in which there was a controversy between citizens of different states, (and that the matter in dispute exceeds, exclusive of costs, the sum of \$500 is not questioned,) within the meaning of the removal act of 1875? That statute provides "that *any* suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there shall be a controversy between citizens of different states," may be removed by either party into the circuit court of the United States for the proper district. In view of the character and necessary form of the present action, and of the

fact that it is a proceeding of which the probate courts of the state had not jurisdiction, the jurisdiction to entertain it being by state statute vested in the circuit courts of the state, and in view of the broad language of the removal act of 1875, I am unable to perceive why this is not a "suit" in which there is "a controversy between citizens of different states" within the meaning of that act. And this conclusion, it seems to me, is strongly supported by the language of Justice Field in the opinion delivered by him in *Gaines v. Fuentes et al.*, *supra*. It is true that was in form a suit brought to annul a will, as a muniment of title, to restrain the enforcement of a decree admitting it to probate; but, as said by Justice Bradley in his dissenting opinion, it was a proceeding not merely to set aside the will so far as it affected the defendants in error. Its real object was to revoke the probate of a will, and as the case was originally commenced in the state court of Louisiana, and as the question was whether it could be transferred to the federal court, there does not seem to be a very substantial distinction upon principle between that case and the one at bar. The removal in that case was attempted to be made under the act of congress of March 2, 1867, which authorizes removals on the ground of prejudice and local influence. And even that act, Justice Field, speaking for the majority of the court, says, "covered every possible case involving controversies between citizens of the state where the suit was brought and citizens of other states, if the matter in dispute, exclusive of costs, exceeded the sum of \$500. It mattered not whether the suit was brought in a state court of limited or general jurisdiction. The only test was, did it involve a controversy between citizens of the state and citizens of other states, and did the matter in dispute exceed a specified amount? And a controversy was involved, in the sense of the statute, whenever any property or claim of the parties, capable of pecuniary estimation, was the subject of litigation, and was presented by the pleadings for judicial determination." An examination of the opinion will show that jurisdiction was sustained as well upon the provisions of the act authorizing the removal as upon the point that the action was one to annul the will as a muniment of title; for the court say,

further, that "if the federal court had, by no previous act, jurisdiction to pass upon and determine the controversy existing between the parties in the parish court of Orleans, it was invested with the necessary jurisdiction by this act itself as soon as the case was transferred. In authorizing and requiring the transfer of cases involving particular controversies from a state court to a federal court, the statute thereby clothed the latter court with all the authority essential for the complete adjudication of the controversies, even though it should be admitted that that court could not have taken original cognizance of the cases." And further, after discussing the point that the suit was one to annul the will as a muniment of title, the opinion proceeds: "But * * * it is *sufficient, for the disposition of the case, that the statute of 1867, in authorizing a transfer of the cause to the federal court, does, in our judgment, by that fact, invest that court with all needed jurisdiction to adjudicate finally and settle the controversy involved.*" With equal force might this language be used in considering the question as it arises in the case at bar under the removal act of 1875.

It is also observed by Justice Field, in his opinion, that "the limitation of the original jurisdiction of the federal court, and of the right of removal from a state court, to a class of cases between citizens of different states involving a designated amount, and brought by or against resident citizens of the state, was only a matter of legislative discretion. The constitution imposes no limitation upon the class of cases involving controversies between citizens of different states to which the judicial power of the United States may be extended; and congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the federal judiciary."

Since the jurisdiction to establish a lost will was vested by statute of the state in the circuit courts of the state, and not in the probate courts; and since the act of congress of 1875 authorizes the removal from the state circuit court to the federal court of *any* suit involving a specified amount, and in which there is a controversy between citizens of different states; and in view of the enunciation of the supreme court

bearing on the question in *Gaines v. Fuentes*,—I am of opinion that this cause was removable under the act of 1875, and that, upon its transfer under that act, this court became invested with jurisdiction to determine the controversy between the parties.

Motion to remand overruled.

MOONEY v. AGNEW and others.

(Circuit Court, D. Colorado. ———, 1880.)

1. REMOVAL—JUDGMENT—APPEAL—SCIRE FACIAS—ACT OF MARCH 3, 1875.—Process was served upon, judgment was recovered against, and an appeal was taken by, two of several defendants in an action in a state court. A writ in the nature of a writ of *scire facias* was subsequently served upon two other of the defendants, while such appeal was pending, in order to make them parties to the judgment. *Held*, upon the petition of the last two defendants, that the case was not then in a condition to be removed to the circuit court, under the last clause of section 2, of the act of March 3, 1875.

Motion to Remand.

———, for plaintiff.

———, for defendant.

HALLETT, D. J. A motion was made some days ago to remand this cause to the district court of Arapahoe county, from whence it was removed. It appears that the action was brought against some 20 or more defendants, two of whom were served with process, and judgment rendered against them at the last term of the district court of Arapahoe county. These defendants appealed the cause to the supreme court of the state. Soon afterwards two other defendants were served, and they, upon certain petitions, removed the case into this court. The petitions show that all the defendants, as well those against whom judgment was rendered as those making the application, and those who have not been served in the cause, are residents of other states,—that is, not residents of Colorado,—and the plaintiff is a resident or citizen of this state, so that,

as to the citizenship of the parties, the plaintiff is a citizen of this state, and the defendants are citizens of other states, and upon that it would seem to be a controversy between citizens of different states, all of the defendants differing in their citizenship from the plaintiff; and it would seem, also, that the application for removal to this court is made under the last clause of section 2 of the act of 1875. That clause is that, in any suit mentioned in the section, if there shall be a controversy which is wholly between citizens of different states, that can be fully determined as between them, then one or more of the plaintiffs or defendants actually interested in such controversy may remove the cause to the circuit court; that is, all the defendants being citizens of states other than that of which the plaintiff is a citizen, the application may be made by one or more of them; and upon such application, if the cause is in condition to be removed, the removal may be had without the concurrence of others of the defendants.

But there seems to be a difficulty as to the condition of the case. As stated before, judgment has been rendered as to two of the defendants, and they have taken an appeal to the supreme court of the state. As to them, the cause is not in a condition for removal, because it has passed to an appellate tribunal, and the rule is that the removal must be had before the trial of the cause. As to the other defendants in the cause,—those who have been served and made this application for removal, and those who have not been served,—the cause is in a condition for removal. But the controversy which is mentioned in this section is regarded by the court as an entire thing,—that is to say, the controversy is between the plaintiff and all these defendants,—and it stands now in this attitude: that the controversy as to two of the defendants is pending in the supreme court of the state, and as to the others, in the district court of the state, and it cannot be removed at all unless it be removed as to all. We must have the whole of it, if we are to have any; and because as to two of the defendants it is not removable, for that reason it is not removable as to any. We have heretofore held that in a cause in

which judgment has been rendered against some of the defendants, and no appeal taken by those defendants from the judgment, that as to those defendants the controversy is ended; and, so far as it is still an existing controversy, standing between the plaintiff and those who still contest the right of the plaintiff, it may be removed into this court. But that is not the position of this case. The controversy is still going on; still waged between the plaintiff and the defendants against whom judgment has been taken, as well as against those against whom no judgment has been taken.

If we consider further the attitude of the case in the state court, and the position of these parties who have been brought in, the reason for this conclusion will be more apparent. This writ which has been issued is in the nature of a writ of *scire facias*, and it is to make the other parties, the persons served, parties to the judgment which has been rendered against the two defendants, and from which an appeal has been taken. If it should result in the supreme court of the state that this judgment should be reversed, there would be no ground of proceeding against these parties who are now served, because they are to be made parties to the judgment which is already of record in the district court of the state. If that judgment should be removed by the action of the supreme court of the state, there would be no basis for proceeding against these defendants. This proceeding stands upon the theory that there is a judgment in the district court of the state to which these persons are to be made parties; and, if that judgment should be reversed or set aside, there could be no proceeding against them. Of course, we cannot be put in the position of having a suit here which will be subject to the contingency of reversal of the judgment of the district court of the state.

The cause will be remanded according to the motion.

IN THE MATTER OF THE PETITION OF THE BARNESVILLE &
MOORHEAD RY. Co., etc.

(District Court, D. Minnesota. October, 1880.)

1. REMOVAL—JURISDICTION—TIME WHEN CAUSE CAN PROCEED.—In the case of a removal the jurisdiction of the federal court is not complete, so as to hear and determine the cause, before the day prescribed by the statute, although a transcript has been filed.

Application to proceed with the condemnation of a railroad and the necessary land.

Bigelow, Flandrau & Clark and *R. B. Galusha*, for petitioner.

Gilman & Clough, for respondent, the Northern Pacific Railroad Company.

NELSON, D. J. The Barnesville & Moorhead Railway Company, organized under the general railroad laws of the state of Minnesota, commenced proceedings under title 1, c. 34, Young's Minn. St., to obtain by condemnation a crossing over the track of the Northern Pacific road at or near Moorhead, in the county of Clay, and the land necessary for that purpose. The power to acquire by condemnation a crossing is granted by chapter 80, § 1, Minnesota Session Laws of 1879, and by section 3 the proceedings to obtain the land shall be instituted and conducted in the same manner as other similar proceedings by railroad companies under the General Statutes above alluded to, with some reservations, which are not important here.

A petition stating the object and amount of land, etc., to be taken was filed in accordance with the statutory provisions for the appointment of three commissioners to ascertain and report on the compensation, and presented to the district court of the state of Minnesota in and for the county where the land and crossing are situated, and proper notice given as required. At the time of the hearing, September 28, 1880, the Northern Pacific Railroad Company appeared by counsel and filed a petition stating, *inter alia*, that it will suffer damages to a greater amount than \$1,000; that it is a company created and existing by virtue of certain acts of the congress

of the United States, attaching them, with the act of the state of Minnesota giving the company the right to build a railroad across the state, to its petition; and alleges "that it has a defence arising under the laws of the United States, to-wit: that it is a corporation of the United States created and existing as aforesaid, and holds its right of way, rights, and property under the acts of congress aforesaid, and that the state of Minnesota has no power to confer upon any person or corporation the right to enter upon the same or take the same in the manner proposed by the said proceedings; wherefore your petitioner, the Northern Pacific Railroad Company, prays that the said proceedings be removed into the circuit court of the United States for the district of Minnesota, and that this court proceed no further therein."

A bond with sureties that the Northern Pacific Railroad Company will enter in the United States circuit court, on the first day of the next session thereof hereafter to be holden, a copy of the record in the said suit and proceeding, etc., accompanied the petition, and was filed.

The district court of the state made the following order:

"Ordered that the application of the Northern Pacific Railroad Company to remove the said proceedings into the circuit court of the United States for the district of Minnesota be and the same hereby is granted, and that no further proceedings in this matter be had in this court. By the court.

"October 6, 1880.

O. P. STEARNS, Judge."

The Barnesville & Moorhead Railway Company have procured a properly-certified copy of the record in the state court, and filed it in the United States circuit court, October 18, 1880, the next regular session of the court being on the second Monday of December, and on this copy of the record asks the court to proceed with the condemnation of the crossing and the necessary land, etc.

The Northern Pacific Railroad Company objects to the jurisdiction of the court to proceed in the matter at this time. The right is given by the statutes to the Northern Pacific Railroad Company, whose land is to be condemned and track crossed, to show cause, on the hearing for the appointment of commissioners, against granting the prayer of the petition,

and any of the facts therein contained may be disproved, and the court shall hear the proofs and allegations of the parties; and if satisfied that the public interests require the crossing to be made, and the lands, etc., to be taken are necessary for the purpose, it shall make an order appointing three commissioners to ascertain the amount to be paid by the petitioning corporation to persons interested. An appeal is allowed from this appraisement of the commissioners, to be prosecuted in the court where their report is filed, and it is to be submitted to a jury to re-assess the damages awarded, etc. Whether the proceeding, as shown by the record presented, is essentially political in its character and not judicial, and whether it is a suit within the meaning of the second section of the removal act of 1875, it is not necessary at this time to determine. All parties appear to agree that it is a suit or proceeding which can be removed from the state court, and I shall not on this application consider the question.

The only point to be decided is, has the federal court at this time jurisdiction so as to proceed with the matter? I am inclined to the opinion that on filing the petition in the state court, making a proper case for removal, and executing and filing the bond required, jurisdiction attaches in the circuit court, and when at any time it is known by the federal court that such steps have been taken in the state court for removal, either by a copy of the record being filed or entered therein before the time required by the statute, many incidental proceedings may be taken, and provisional remedies, as attachments, etc., may be granted on motion, as could be done after the commencement of suit by original process and appearance of the defendant; but the cause cannot proceed until the limited time has expired and the transcript entered. Such interpretation of the removal acts has support in the opinion of the supreme court of the United States when construing section 641 of the Revised Statutes, involved in the case of *Virginia v. Rives*, 100 U. S. 316. There is a declaration in that section similar to the one in the act of 1875 that "upon filing of the petition (no bond being required) all further proceedings in the state court shall cease. * * *

The language of the act of 1875 is: "The state court shall

accept the petition and bond, and proceed no further in such suit;" and the court say, on page 317: "It is therefore a material inquiry whether the petition of the defendants sets forth such facts as made a case for removal, and consequently arrested the jurisdiction of the state court and transferred it to the federal court; "thus implying that the federal court acquired jurisdiction *ipso facto* on filing petition and bond.

So, also, in the *Removal Cases*, 100 U. S. 475, the court say: "While the act of congress requires security that the transcript shall be filed on the first day, it nowhere appears that the circuit court is to be deprived of jurisdiction if by accident the party is delayed until a later day in the term. If the circuit court, for good cause shown, accepts the transfer after the day, and during the term, its jurisdiction will, as a general rule, be complete, and the removal properly effected." I understand, from the opinions of the court in these cases, that when the jurisdiction of the state court ceases that of the federal court attaches for some purposes, on entering a copy of the record, so that the court may know the facts; but the jurisdiction of the federal court is not complete, so as to hear and determine the cause, although a transcript is filed, until on the day prescribed in the statute, or after, if the court accepts it. See *Dillon on Removal of Causes*, 71; *Mahoney Mining Co. v. Bennett*, 4 Sawyer, 289.

Inasmuch as the next proceeding in the case in hand is for the defendant to contest the facts in the petition, I am of the opinion the court cannot at this time entertain it.

Application to proceed in the matter denied.

In re McEWEN and others, Bankrupts.

(Circuit Court, D. Indiana. ———, 1880.)

1. **APPEAL—CIRCUIT COURT—TIME.**—An appeal from an order of the district court should be entered in the circuit court within ten days after the appeal is taken, although the circuit court is in session at the time the order is made, and continues so up to the end of the ten days.

In Bankruptcy. Motion to Dismiss Appeals.

Herod & Winter, Ralph Hill, and S. Stansifer, for assignee. Harrison, Hines & Miller, and McDonald & Butler, for creditors.

DRUMMOND, C. J. This is a motion to dismiss two appeals that have been taken in a bankruptcy case from orders of the district court disallowing certain claims against the estate of the bankrupts.

The facts are that the order disallowing these claims was made by the district court on the twenty-seventh of November, 1879. That order seems to have been made in the absence of counsel for the claimant, and on an application to the court on the seventeenth of December, 1879, the court opened the orders and reconsidered the cases for the purpose of allowing the parties to take an appeal to the circuit court, reforming its orders in both cases. An appeal was taken from that order on the seventeenth of December, and there was no question about the appeal being taken in the proper time, and the bond being given so as to consummate that appeal. The appeal was taken during the term of the court. In fact, the term of the court still continues.

The objection on the part of the assignees to this appeal is that the appellants did not comply with the law of congress in entering their appeal in the circuit court within ten days from the time the order was rendered. The question is whether that should have been done.

The contention between the two parties is: On the part of the assignees, that the appeal should be entered in the circuit court, if the court is in session at the time the order is entered, and continues up to the end of the ten days, during the court, although it is the same term. On the other hand, it is claimed by the appellants that it is sufficient if the appeal is entered in the circuit court at the succeeding term after the order entered.

I am of the opinion that the true construction of the acts of congress and of the rules of the supreme court, on the subject, is that the appeal should be entered in the circuit court within ten days after the appeal is taken, although the circuit court is in session at the time the order is made, and continues so up to the end of the ten days.

It is necessary to recur to the language of the original bankrupt act on this subject: "No appeal shall be allowed in any case, from the district to the circuit court, unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." "Such appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same."

The only difference between the language and that now found in the Revised Statutes as a part of the bankrupt law, is that the word "first" is left out in the revision; but that clearly cannot make any difference in the sense. "The appeal shall be entered at the term of the circuit court which shall be held within and for the district next after the expiration of ten days from the time of claiming the same," means precisely the same as though it were "first held within and for the district;" because it is claimed that the word "next" gives significance to the sentence, and it means the term succeeding that at which the order is entered next after the expiration of ten days. See sections 4981 and 4982, Rev. St. U. S.

The true meaning, I take it, is that if the circuit court is in session more than ten days after the order is made, the appeal shall be then entered. That is the term, within the meaning of the law, next after the entering of the order.

This is the twenty-sixth rule made by the supreme court under that law: "Any supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, according to the provisions of the eighth section of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the district court upon his claim; and he shall file his appeal in the clerk's office of the circuit court within ten days thereafter, setting forth a statement, in writing, of his claim, in the manner prescribed by said section." The supreme court gave a construction of the statute by enacting that rule, and it would seem as though in that way only

can we carry out the object which the bankrupt law had in view. Now, take this district. The court, by statute, only sits twice a year, once in May and once in November, and it certainly could not have been the intention of congress in such a case that there should be an interval of six months, or more, as there might be before the entry of an appeal should be made in the circuit court, and therefore the supreme court, in considering the statute, required that the appeal should be entered in the circuit court within ten days after the order made by the district court.

If it is to be entered at the succeeding term, and if the words "next after the expiration" from the time of claiming the same mean the succeeding term, then, of course, there is no significance to be given to the word "first." Perhaps, on that account, it was omitted in the Revision.

The statute has been construed in other cases—in *Wood v. Bailey*, 21 Wall. 640; *In the Matter of Coleman*, 7 Blatchf. 192—in which the court held that after the claim of a creditor of a bankrupt's estate was rejected by the district court, and an appeal taken from the decision of the district court, he must enter his appeal within ten days in the circuit court, and comply with order No. 26, and that he must also set forth a statement in writing, etc. This has been the law ever since the statute was enacted, and section 4984 of the Revised Statutes requires that, upon entering his appeal in the circuit court, the appellant shall file with the clerk a statement of his case and the amount claimed in his declaration. In the case in 7 Blatchford the appeal was dismissed because the entry was not made accordingly. And the point is decided in the same way in *In re Place v. Sparkman*, 4 B. R. 541. And unless the omission of the word "first" in the Revision changes the meaning of the law as it was originally enacted, then these decisions are in point. And although the last are not absolutely controlling in this court, still I think it must be considered the true construction of the act. It is especially the construction which the supreme court has placed upon the original bankrupt law, and I do not think the omission of the word "first" changes that construction.

So the appeals will be dismissed in both cases.

STEIGER v. BONN.

(Circuit Court, D. New Jersey. October 18, 1880.)

1. PROCESS—SERVICE—FRAUD.—Where a defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and the process dismissed.

Union Sugar Refinery v. Mathiesson, 2 Cliff. 304-309.

Motion to set aside Writ, etc.

J. Henry Stone, for defendant.

Mr. Gilchrist, Att'y Gen., for plaintiff.

NIXON, D. J. This is a motion to set aside the summons issued in the case, on the ground that the defendant was induced, by deceptive and fraudulent means, to come within the jurisdiction of the court for the purpose of serving the writ upon him. There seems to be a substantial agreement between the counsel of the respective parties as to the law of the case. They assent to the rule laid down by Mr. Justice Clifford in *The Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304-309, where he says "that where the defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and that the process should be dismissed." The only question is whether the facts shown are sufficient to identify the plaintiff with, and hold him responsible for, the deception and fraud used to lure the defendant into the state.

The facts are that the defendant is a citizen of the state of New York, residing in the city of New York, and engaged in the business of importing, publishing, and selling school books in the German language; that a convention of the German-American Teachers' Association, a body composed of German teachers from various states of the Union, was to

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be held on the twenty-eighth, twenty-ninth, and thirtieth days of July last, at the high-school building in the city of Newark; that many of the members of this association were customers of the defendant, and in the habit of purchasing books of him; that the plaintiff and defendant had a lawsuit then pending in the supreme court of the state of New York, growing out of some business transactions between them; that the plaintiff, desirous of removing said controversy into this jurisdiction, and conceiving the notion that the defendant would attend the sessions of the German School Association at Newark, procured a summons from this court and took it to the United States deputy marshal at Jersey City, gave him instructions in regard to its service on the twenty-eighth of July, and introduced to the marshal a gentleman, whose name is not known, who knew the defendant by sight, and who was to accompany the officer to Newark to designate to him the defendant; that they went to Newark on the afternoon of the 28th, and were joined by another man, called "Charley," who was also to aid the marshal in identifying the defendant; that they visited the convention on the twenty-eighth and twenty-ninth of July, but failed to find the defendant, one of these men paying the officer for his attendance on the last-named day, and promising to give him notice if his attendance was desired on the next day; that he was notified to meet these men at Newark on the afternoon of the 30th, when the defendant was found and the writ served; that the defendant visited New Jersey in consequence of having received at his place of business in the city of New York, at about 1 o'clock P. M. of that day, a telegram of the following tenor:

"NEW YORK, July 30, 1880.

"To E. Steiger, 25 Park Place, New York: Please call at headquarters of German-American teachers, at 842 Broad street, this afternoon.

[Signed]

"W. I. ECKOFF."

—that the W. I. Eckoff, whose name was signed to the telegram, was a German teacher, and president of the convention then assembled at the place designated, with whom the plaintiff had a casual acquaintance; that the telegram was not

sent by the said Eckoff, nor by any one in his behalf, and it was, doubtless, forwarded by some one to bring the defendant within this jurisdiction.

If the plaintiff, or any one acting in his behalf, was instrumental in decoying him hither by the use of such a device, it must be held that the writ should be quashed and the suit dismissed. But if other persons, not connected with the plaintiff, procured his attendance, even by these improper methods, for any purpose, the plaintiff has the right to avail himself of the opportunity of serving the writ. The defendant is *found* in the district, in the sense in which the term is used in the eleventh section of the judiciary act, (section 739, Rev. St.,) and the plaintiff is not chargeable with any deception or fraud practiced by these over whom he had no control, and for whose actions he is not responsible. Such I understand to be the substance of the opinion of the court in the case of *The Union Sugar Refinery v. Matheisson, supra*.

The question involved must be decided by ascertaining upon which party the burden of proof lies. There is no pretence that the deputy marshal had any knowledge of the forged telegram. Do the undisputed facts make such a presumption against the plaintiff or his agent, who accompanied the officer, that he is called upon to rebut them with proof that he was not privy to the deception practiced upon the defendant?

I am of that opinion. The presumption of the plaintiff's participation in the deception is stronger here than in the case of *Hevener v. Heist*, 30 Leg. Int. 46, and yet in that case the court set aside the writ. The defendant had been brought to Philadelphia from Bucks county, Pennsylvania, by a forged telegram, and on his arrival he was served with the writ by the deputy sheriff. Judge Sharswood thought the burden of proof was upon the plaintiff to explain how the officer knew that the defendant was coming. There was no evidence as to who sent the telegram, and yet the learned judge held that the failure of the plaintiff to show that he did not direct the officer in the service was fatal to the legality of the proceedings. "I am clearly of the opinion," he says, "that it was incumbent on the plaintiff to produce the sheriff's dep-

uty who made the arrest, in order to show that it was not by the instruction of the plaintiff or his attorney that he went with the writ at that time to that place to arrest the defendant."

The evidence is uncontradicted that the deputy marshal did go, at the time and place designated by the agent of the plaintiff, to make the service of the summons, and there is no disavowal on his part that he procured the presence of the defendant then and there.

The writ must be set aside.

EXCHANGE NAT. BANK OF PITTSBURGH v. THIRD NAT. BANK
OF NEW YORK.

(Circuit Court, D. New Jersey. October 2, 1880.)

1. **BILL OF EXCHANGE—ACCEPTANCE—AGENT.**—An agent for the collection of a bill of exchange is liable, if he fails to notify his principal when such bill has been duly presented and acceptance according to its tenor refused.
2. **SAME—SAME—SAME.**—Certain bills of exchange addressed to "Walter M. Conger, secretary Newark Tea-Tray Company, Newark, N. J.," were forwarded to the defendant bank for collection, without special instructions from its principal, or any information which might qualify or explain the import of the bills upon their face. The bills were duly presented to Walter M. Conger, and were accepted in writing across their face, as follows: "Accepted. Payable at the Newark National Banking Company. Walter M. Conger." Held, in view of the facts, and in view of the decisions of the courts of the state in which the drawee of the bills resided, and where they were to be accepted and paid, and of concurrent decisions elsewhere, that the defendant did not commit any breach of duty in taking the acceptance in this form.

———, for plaintiff.

———, for defendant.

McKENNAN, C. J. This suit is brought to recover the amount of 11 several drafts discounted by the plaintiff, and transmitted to the defendant for collection, and alleged to have been lost by the defendant's negligence in receiving an improper acceptance thereof, and in not causing the same to

be protested for non-acceptance, and due notice to be given to the plaintiff. A jury was dispensed with, and the case heard by the court upon the evidence submitted.

The following facts are found as the result of this evidence:

First. That the plaintiff is the holder of 11 drafts for various sums, amounting altogether to \$12,292.58, which were drawn by Rogers & Burchfield, at Pittsburgh, to the order of J. D. Baldwin, and by him indorsed on Walter M. Conger, secretary Newark Tea-Tray Company, Newark, N. J.

Second. These drafts bear different dates, from June 8, 1875, to September 20, 1875, and are in all respects similar, except as to the sums payable, and are in the following form:

\$1,042.75.

PITTSBURGH, June 8, 1875

Four months after date pay to the order of J. D. Baldwin ten hundred and forty-two and 75-100 dollars, for account rendered, value received, and charge to account of

ROGERS & BURCHFIELD.

To Walter M. Conger, Secretary Newark Tea-Tray Co., Newark, N. J.

Third. They were transmitted for collection at different times before maturity by the plaintiff to the defendant, in letters describing them by their numbers and amounts, and by the words "Newark Tea-Tray Co.," and were sent by the defendant to its correspondent, the First National Bank of Newark, enclosed in letters describing them generally in the same way.

Fourth. By the First National Bank of Newark they were presented for acceptance, and, with one exception, were accepted, by writing on the face of them as follows: "Accepted. Payable at the Newark National Banking Co. Walter M. Conger."

Fifth. The First National Bank of Newark held them for payment, but the plaintiff was not informed of the form of the acceptances until the thirteenth and nineteenth of October, 1875. Two of the drafts were returned to it by the defendant when both the drawers and indorsers were insolvent.

Sixth. At the time when the drafts were discounted by the plaintiff the drawers were in good credit; but none of them have been paid, and they were duly protested for non-payment.

Seventh. The Newark Tea-Tray Company is a corporation created by the laws of New Jersey, and doing business in that state, and Walter M. Conger was its secretary.

The question, upon these facts, is, was the defendant guilty of negligence in the discharge of its duty as the plaintiff's agent, whereby the plaintiff was subjected to loss?

What, then, was the duty of the defendant? The drafts were payable at a certain future day, and were sent to the defendant for collection. As was said by *Selden, J.*, in *Walker v. The Bank of the State of New York*, 9 N. Y. Rep. 582-584, "that any agent, whether it be a bank or an individual, receiving a note or bill from the holder for collection, is responsible for any loss which the holder may sustain on account of any neglect in presenting it or in giving notice of its dishonor; that it is the duty of an agent who receives for collection a bill of exchange, payable at some future time, to use due diligence in presenting the same for acceptance, and if he fail to do so, or fail to give notice in case acceptance is refused, he will be liable." Failure to present a bill for acceptance before maturity by an agent to whom it is entrusted for collection, without special instructions, will not constitute want of due diligence, because acceptance before the day fixed for payment is not necessary to hold the drawer and indorser, as was held in *Bank of Washington v. Triplett*, 1 Pet. 25; but if it is presented, and acceptance according to its tenor is refused, if the agent fail to give notice he will be liable. The drafts here were addressed to "Walter M. Conger, secretary Newark Tea-Tray Company, Newark, N. J.," were duly presented to him, and were accepted in writing across their face, as follows: "Accepted. Payable at the Newark National Banking Company. Walter M. Conger."

It is contended by the plaintiff that the drafts were addressed to the Newark Tea-Tray Company, and that the acceptances were not by that company, but by Walter M. Conger, individually, and that, by taking them in this form,

the defendant caused the loss to the plaintiff of the drawers of the bills; and upon this hypothesis the right of the plaintiff to recover entirely depends. It is urged with equal earnestness, on the other side, that in legal effect the drafts were drawn on Walter M. Conger, with the suffix of secretary as matter of personal identification, and that the acceptances were by the proper person, in his proper character.

The most that can be imputed to the defendant is that it erred in judgment as to the import of the address upon the bills, and therefore did not cause them to be protested for non-acceptance, and notice to be given to the parties. Is this unfaithfulness or negligence in a sense which will subject the defendant to liability for the loss complained of? Whether the defendant was bound to present the drafts for acceptance before their maturity or not, it certainly evinced a disposition to fulfil its agency with diligent faithfulness, by promptly presenting them for acceptance to the person named as drawee. And this it did without special instructions from its principal, and without any information which might qualify or explain the import of the drafts upon their face, or repel the presumption arising from the restricted functions of the secretary of a corporation, that he was not its financial representative. Thus left to the exercise of its own judgment, when it regarded Mr. Conger as in his individual character it did not fall into a culpable or irrational error, because it followed the evidence of the decisions of courts of the highest standing upon the subject.

In *Kean v. Davis*, 1 Zab. 683, a case decided by the supreme court of the state, in which the acceptances here were made and were payable, and therefore of special if not of decisive significance, it was held that a bill signed "John Kean, president Elizabethtown & Somerville Railroad Company," was to be taken as *prima facie* the individual bill of John Kean; but, inasmuch as the railroad company was named in the body of the bill as payee, such an ambiguity existed as to render parol evidence admissible to explain it, and show that the bill was drawn in behalf of the company.

In *Moss v. Livingston*, 4 N. Y. 208, a bill was drawn on "John R. Livingston, Jr., president Rosendale Mining Com-

pany, New York," and was accepted by "John R. Livingston, Jr., president Rosendale Mining Company, 16 Wall street," and the court held that the company was not bound by it, saying: "The bill cannot be deemed the obligation of the company. It does not purport to have been drawn in their behalf, nor was addressed to them, or accepted in their corporate name. They were not, therefore, bound by it. In order, then, to give it any legal effect, we must hold it to be the private act of the parties whose names are written upon it, and binding upon them as an ordinary bill of exchange."

There are many other cases of similar tenor which hold that affixing an official or representative designation to the name of a promissor will not change the personal import and character of an obligation which does not indicate a different liability on its face. These cases are collected in 1 Daniell on Neg. Inst. § 455*d*, and in the note to *Burlingame v. Brewster*, 22 Amer. Rep. 177, to which no more than this general reference is needed.

Now, that there are cases in conflict with these referred to is undeniable; but, whether the preponderance of authority is in favor of the plaintiff's or the defendant's contention, is indecisive of this case. Intelligent and cautious judgment, upon the information with which it was supplied, and reasonable diligence, are the conditions which the defendant engaged to fulfil. If, then, in accordance with the decisions of the courts of the state in which the drawee of the drafts resided, and where they were to be accepted and paid, and of concurrent decisions elsewhere, it treated them as drawn on Walter M. Conger, and took his acceptances accordingly, it did not commit any breach of duty, and the plaintiff cannot recover.

Moreover, the plaintiff alone knew who was the intended drawee, as understood between it and the drawers. Of this its agent ought to have been advised, that it might have a certain guide in the performance of its duty. But the plaintiff omitted to furnish this information, and now seeks compensation for an alleged injury, which the exercise of thoughtful diligence on its part would have averted. If there was

any error of judgment by the defendant, the plaintiff is by no means blameless.

There must, therefore, be a judgment for the defendant, upon the facts found by the court, which the clerk is hereby directed to enter.

BANK OF SHERMAN v. E. M. APPERSON & Co.

(Circuit Court, W. D. Tennessee. October 13, 1880.)

1. **NEGOTIABLE NOTES—RECITING CONSIDERATION—PAYABLE TO AN ADMINISTRATOR.**—Neither the fact that a note is payable to an administrator, nor that it recites that it was for value received, "being for a part of the third payment on the Goree plantation, as per agreement of the fourteenth February, 1874," destroys its negotiability, or subjects it to the conditions of that agreement.
2. **NEGOTIABLE NOTES—OMISSION OF THE WORDS "OR ORDER."**—It is well-settled that a note omitting the words "or order," is not negotiable unless it contains other words of like import; but this has been changed in Tennessee by statute, and neither those nor any equivalent words are necessary.
3. **COMMERCIAL LAW—STATE STATUTES—WHEN BINDING.**—While no decision or statute of a state restricting or impairing the rights and remedies secured to the citizens of the several states under the general commercial law, or divesting the federal courts of their cognizance of those rights and remedies, is binding on those courts, statutes which *enlarge* the commercial law will be enforced. They are not confined to the commercial law as it exists outside such statutes.
4. **NEGOTIABLE NOTES—BONA FIDE HOLDER FOR VALUE.**—Nothing less than actual knowledge of the facts relied on to establish the defence of a failure of consideration, or bad faith, can defeat the right of a *bona fide* holder for value to recover on a negotiable note. Mere knowledge of suspicious circumstances, which, if followed up by inquiry, would develop the facts, is not sufficient in the federal courts, although the rule is otherwise in Tennessee. The facts in this case would not, it seems, defeat the recovery in the Tennessee state courts; certainly not in this court.

T. B. Micon, for plaintiff.

Myers & Sneed, for defendants.

HAMMOND, D. J. On motion for a new trial. Upon full consideration of the arguments made upon this motion, I am satisfied with the rulings I made upon the demurrer and at

the trial upon the points then raised against the negotiability of the note sued on. I think it entirely clear of all doubt that an administrator may negotiate a note made payable to him, and that the recital of the consideration in the face of the note does not at all affect its negotiable character. If the note in question had said that it was subject to the agreement for the purchase of the land, or used other words indicating that it was to be burdened with the conditions of that agreement, the case would be different. *Cushing v. Field*, (Sup. Ct. Me.) 13 Chi. Leg. News, 11. The note is hereinafter copied, and I need only refer to its language to show that it is a simple recital of the consideration. *Burchell v. Slocock*, 2 Ld. Raym. 1545; *Bailey v. Rawley*, 1 Swan, 295; *Baxter v. Stewart*, 4 Sneed, 213.

Even in Tennessee, then, where whatever is sufficient to put a person upon inquiry amounts to notice, the mere recital that the consideration was for land does not have this effect. *Ryland v. Brown*, 2 Head, 270; *Merritt v. Duncan*, 7 Heisk. 156. But in the courts of the United States, where the rule is that there must be actual notice, or bad faith, to charge the holder for value, there can be no question that the recitals of this note are not sufficient to charge the plaintiff with any equities between the defendants and the payee. *Goodman v. Simonds*, 20 How. 343; *Merritt v. Duncan*, *supra*; *Murray v. Lardner*, 2 Wall. 110.

This brings us to the question of fact upon the proof as to notice. It is not pretended that there was anything further to charge plaintiff with notice than that he knew the land lay in Arkansas, and that Gregg was an administrator in Arkansas. It is said by a witness that the officer of the bank "looked at some papers" at the moment of taking the note before he agreed to take it. What the papers were, whether one thing or another, is not proved, nor is there anything from which to infer that there was in that circumstance a probable knowledge of any fact connected with this note. It may have been a report of some commercial agency showing the standing of defendants, for anything that appeared in proof, or it may have been some other paper totally disconnected with this transaction. All knowledge of the alleged facts are denied

by the officers. But, more than this, the defence is that the consideration of this note has failed by reason of a failure of title and diminution in quantity of the land, and that by the contract of purchase the money was not to be paid until the title was satisfactory. There is not a single circumstance or fact in the proof which even tends to show that the plaintiff had any knowledge that there were such defences to the note, or of the facts upon which they were predicated. It does not follow because the plaintiff knew the note was given for land that it knew the facts as to the title or quantity. The whole argument of defendants is grounded upon the assumption that because the face of the note itself conveyed a knowledge that there was a contract for land, that the land lay in Arkansas, that the payee was an administrator, and because he was pledging a note of \$1,500 for a loan of \$500 at an enormous interest of 4 per cent. a month, therefore, in the language of the brief, "the bank had notice or knowledge that there was a probable defence to the note."

Now, if the decisions of the supreme court already cited, and many others, mean anything, they forbid, in this court, that any circumstance short of actual knowledge of the facts constituting the defence shall be taken to defeat the holder of his right to recover. The proof showed that in Texas, where this bank resides, the rate of interest was lawful and not unusual, and therefore no imputation of bad faith can be based upon that circumstance. As to the fact that the negotiator of the loan was an administrator, it is wholly immaterial. He may have needed the money for the purposes of the estate. The note may have belonged to him, having been taken in settlement for his commissions, or for a debt, or for a distributive share of the estate, for anything the bank knew to the contrary. He was the payee; the legal title was in him, and the bank need not, under the commercial law of the United States, trouble itself to inquire into the facts.

Any man may pledge a large collateral for a small loan, and they are often out of all proportion to each other. I could see in the proof nothing tending to show that the bank had actual notice of the fact that the title to the land had failed, or the quantity was diminished, or the quality insuffi-

cient, and nothing tending to show bad faith on its part, and if the jury had found otherwise I should, without the least hesitation, have set aside the verdict and granted a new trial; therefore, no error was committed in directing a verdict for the plaintiff. *Orleans v. Platt*, 99 U. S. 676. I was the more willing to do this, because, although the result would have been the same, no matter how well founded the defences may have been, I allowed the proof upon the issues to be taken, and was satisfied that if the original payee himself had been suing there was absolutely no defence to the suit in a court of law, however it may have been in a court of equity, on a bill for specific performance or a bill to rescind the contract. I shall not undertake to show the correctness of that opinion, because, strictly, it is not properly in judgment, the plaintiff being entitled to recover as a *bona fide* purchaser for value, without notice of any equities in favor of the makers of the note. I should also have mentioned that, even if the contract for the land referred to in the note had been before the bank, it could have safely, in my opinion, have taken this note.

The facts on which the supposed defects of title and other defences rest were, at that time, unknown even to the defendants themselves. The land contract contained a stipulation that the purchase money was not to be paid until certain deeds were executed. Those deeds had been executed, and after their receipt the defendants paid all the money due, and executed this note and others for the purchase money not due in satisfaction of, and for the purpose of, closing up the agreement about the land. The supposed defects in the deeds, the mistakes in them, and their alleged worthlessness to convey the title were afterwards discovered; indeed, they were discovered after the pledge of this note to the bank. This demonstrates that, at the time this note was negotiated, the defendants themselves had no knowledge of the facts constituting their defences.

I come now to consider a new question, raised since the motion for a new trial was submitted, and never before referred to by counsel or detected by the court. The note sued on reads as follows:

"\$1,500.

MEMPHIS, TENN., June 7, 1875.

"On the fourteenth February, 1876, we promise to pay to Col. E. P. Gregg, the administrator *de bonis non* of the estate of James L. Goree, deceased, the sum of \$1,500, for value received, being for a part of the third payment on the Goree plantation purchased of said Gregg, as per agreement of the fourteenth February, 1874. E. M. APPERSON & Co."

It will be observed that the note does not contain the words "or order," "or bearer," "or assigns," or any equivalent words of negotiability. It is now said that this omission destroys the negotiability of this note, and that it cannot be sued upon in the name of the indorsee. This latter objection, as to the form of the suit, should have been taken by demurrer or plea in abatement. But even if so taken it would be untenable under our statutes. Whether negotiable or not, the note is assignable, and may be sued on in the name of the assignee. T. & S. Code, § 1967, and notes; *Wolf v. Tyler*, 1 Heisk. 313. Nor is it a jurisdictional question in this court, for the pleadings show that a suit might have been prosecuted in this court if no assignment had been made, Gregg, the payee, being a citizen of another state. Wherefore, the jurisdiction does not depend upon the commercial character of the paper. Act March 3, 1875, (18 U. S. St. 470.)

If we consult the authorities immediately preceding and subsequent to the statute of 3 & 4 Anne, c. 9, cited in *Muir v. Jenkins*, 2 Cranch C. C. 18, and elsewhere, by the text writers and annotators, it will be discovered, I think, that there has been much confusion of opinion as to the precise effect of that statute on notes omitting the words "or order," usually inserted to give the note negotiability, with the general result that these or other special words were not essential, if from the words actually used an intention to issue negotiable paper were manifested. If, under that statute, and solely by force of it, a note not containing these or equivalent words could be declared upon in the same manner as a bill of exchange, according to the custom of merchants, was entitled to grace, and would support a contract of indorsement, it does not seem satisfactory to hold that the note is not otherwise fully negotiable. And it will be seen that the judicial

and professional mind never fully recognized the soundness of the position. Yet it is well settled that a bill or note is not negotiable unless it contains these words, or some word of like effect, except where made so by local statute. 1 Am. Lead. Cas. (5th Ed.) 399, top page; 3 Kent, (12th Ed.) 77; 1 Dan'l, Neg. Inst. §§ 104-107. The most direct and satisfactory case I have found is *Gerard v. La Corte*, 1 Dall. 194; S. C. 1 Am. Lead. Cas. (5th Ed.) 369.

The unsatisfactory state of the law on this subject induced the state of North Carolina, from which we have derived it, nearly 100 years ago, to enact that "every bill, bond, or note for money, whether sealed or not, and *whether expressed to be payable to order*, or for value received, or not, shall be negotiable in the same manner as promissory notes." Act 1786, c. 4, § 1; T. & S. Code, § 1957. The act of 1762 (chapter 9) had substantially re-enacted the statute of Anne. T. & S. Code, § 1956. The argument now made is that the only effect of the act of 1786 was to make *bills single* negotiable in the same manner as promissory notes were under the act of 1762, and notes like this *assignable*. This is contrary to the words of the act itself, which says that "every note for money, whether expressed to be payable to order or not, shall be negotiable in the same manner as promissory notes." This is more manifest by reference to the original act itself, which this section of the Code more briefly expresses. Besides, it was further amended by the acts of 1820 (chapter 25) and 1837, (chapter 5,) where it is enacted that upon every such instrument the holder may maintain a joint action against the maker and the indorsers, or a several action against any one or more of the indorsers. T. & S. Code, § 1958. See, also, Id. § 1967.

The cases cited in the notes to these sections of the Code fully sustain this construction, which is too plain to require further notice. This note is, then, fully negotiable by our local statute. It is confidently argued, however, that the federal courts do not recognize or enforce the laws of the states upon the subject of commercial law, and that this question must be decided according to the law merchant and the statute of Anne, and that this act cannot change the

rights of the parties under that law. *Swift v. Tyson*, 16 Pet. 1; *Keary v. Farmers' & Merchants' Bank*, Id. 89; *Watson v. Tarpley*, 18 How. 517; *Dromgoole v. Farmers' & Merchants' Bank*, 2 How. 241; 1 Am. Law. Rev. (N. S.) 211, 226.

It is said in *Gregg v. Weston*, 7 Biss. 360, that congress meant by "the law merchant," as used in the act of March 13, 1875, the law of contract governing the note, and that the statute of the state enters into and becomes a part of the contract. Whether this would be so as to *restrictive* statutes may be doubtful under the above decisions, particularly *Watson v. Tarpley*, *supra*. I must confess that if the state has power, by legislation, to *enlarge* the commercial law, it does not seem very clear why it should not have power to restrict it in the same way; but there can be no doubt that restrictions are not binding. No case has, however, been cited which holds that a *statute* of a state enlarging the negotiability of bills and notes is not binding on the federal courts. On the contrary, such statutes are frequently enforced. The latest case I find is *Oates v. Nat. Bank*, 100 U. S. 239. There are many others. Nearly all the cases either construe the statute of Anne as adopted by the states, or the statutes in lieu of it regulating the subject of negotiable paper.

The result of the authorities seems to be that while the *decisions* of the state courts construing contracts under the general commercial law are not binding as rules of property or rules of construction on the federal courts, nor are state *statutes* which restrict or impair the rights and remedies secured to the citizens of the several states under the general commercial law, or which divest the federal courts of the cognizance of those rights and remedies, those statutes which enlarge and extend the general commercial law will be enforced. It is so in equity cases. While the federal courts uniformly administer the equitable rights and remedies of the general law, and will not permit any restriction by state legislation or judicial decision, they recognize and enforce any new equitable right given by the legislature of the states. *Broderick's Will*, 21 Wall. 503; *Gaines v. Fuentes*, 92 U. S. 10, at p. 21.

The motion for a new trial is overruled.

BATEMAN v. FARGASON.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. **EQUITY—FRAUD—WHEN PLAINTIFF REPELLED—CLEAN HANDS.**—The maxim that “he who comes into equity must do so with clean hands,” will not repel the plaintiff, unless the fraud complained of in him is a part of the very transaction as to which he seeks relief.
2. **SAME—CASE IN JUDGMENT.**—On a bill to set aside a settlement and eliminate usury from an account which has been paid by a transfer of land, the confession by the plaintiff that he coerced his wife to sign the deeds will not repel him from a court of equity.

George Gantt and *W. D. Beard*, for plaintiff.

Taylor & Carroll, for defendant.

HAMMOND, D. J. This is a bill to re-open the settlement of an account on the ground of usury, undue influence, and violated confidence, amounting to an alleged fraudulent imposition by the defendant upon the plaintiff. It appears by the bill that the plaintiff and defendant were joint owners of a plantation, the plaintiff managing the property in the business of growing cotton, which was sent to the defendant for sale, he being a cotton commission merchant; the supplies to furnish the plantation being supplied by the defendant from his stock of merchandise, or otherwise, and charged to the joint account. The account also contains items of money advanced to the plaintiff to pay for his share of the purchase money of the plantation. The parties had a settlement, and the plaintiff appeared to be indebted to the defendant in some \$20,000. To secure this the plaintiff executed a mortgage on his share of the land, and subsequently an absolute deed in full payment, his wife joining in the conveyance for the purpose of releasing her dower and homestead rights.

The plaintiff alleges in the bill that he procured this acquiescence of his wife by *coercion*, setting forth in detail his angry denunciations of her for her remonstrances, and his threats to have defendant, whom she greatly disliked, appointed guardian for her children, and such other like conduct as procured her signature to the deeds. The bill is demurred to because of this allegation of coercion and con-

fession of fraud upon his wife, and the maxim is invoked that "He who comes into equity must do so with clean hands." The principle indicated by the maxim only applies to the conduct of the party in respect to the particular transaction under consideration, for the court will not go outside of the case for the purpose of examining the conduct of the plaintiff in other matters, or questioning his general character for fair dealing. Bisph. Eq. 61. It does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as moral sense. *Dering v. Winchelsea*, 1 Cox, Ch. 318; *Nichols v. Cabe*, 3 Head, 92; *Sharp v. Caldwell*, 7 Humph. 415; *Mulloy v. Young*, 10 Humph. 298; *Kelton v. Miliken*, 2 Cold. 410; *Lewis' Appeal*, 67 Penn. St. 153, 166.

If it be conceded that the coercion of the wife is evidence of moral turpitude,—and certainly no court can, at this day, do less than severely reprehend such conduct,—still, the plaintiff will not be repelled unless the iniquity complained of in him is connected with and a part of the very transaction as to which he seeks relief. It seems to me plain that, while the coercion of the wife was a method of perfecting the defendant's title to the land, and in that sense connected with the transaction, it is not a part of it. The subject of controversy is the usury in the account, and the other alleged false and fraudulent items as to which there is said to have been an unfair settlement.

The land was given in payment, and the deeds made to effectuate the payment are recited in the bill; the relief asked being to correct the settlement, and to hold it as payment only for so much as is actually due, charging the defendant as trustee for the balance. The case stands as if money had been paid in settlement of defendant's account, and we should be asked to repel the plaintiff because it appeared that he procured the money from some third party—his wife, for example—by questionable and, it may be, fraudulent practices. I do not see that such a case falls within the maxim or rule of equity invoked by the demurrer.

The object of the bill is to surcharge and falsify the merc.
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chandise account, and no relief is asked because of the allegation of coercion of the wife. It might afford her a ground for relief, and she is made a defendant, as are her children; for what purpose it does not appear, unless to enable them to file a cross-bill to recover their alleged dower and homestead rights. But no relief is asked against them; they have not appeared, and no process has brought them here. The case must, therefore, be determined alone as between the plaintiff and the defendant, Fargason.

Mr. Spence, in treating of this and the kindred maxim that "he who asks equity must *do equity*," gives some curious illustrations of its application in ancient times, when the chancellor, as a condition precedent to giving the plaintiff relief, would require him to ask pardon of the defendant, to withdraw slanderous words, to be dutiful to his parent or uncle, and in one case to publicly on his knees ask forgiveness of the defendant; all required because of some depraved conduct by the plaintiff. But even in these cases the wrong redressed was to the defendant and not a third party, and Mr. Spence says they are cited, not as precedents, but curiosities of the law. 1 Spence Eq. Jur. 424, and note.

The cases cited by the learned counsel for the defendant all show that the plaintiff was seeking advantage of or relief from the bad conduct with which he was himself charged. *Creath v. Sims*, 5 How. 192; *Wheeler v. Sage*, 1 Wall. 527; *Bleakeley's Appeal*, 66 Pa. St. 191.

The case of *Wheeler v. Sage*, *supra*, so much relied on in argument, was a case where the plaintiffs had been disappointed in expected profits of a fraudulent transaction by the desertion of their confederate, whose greed induced him to take the whole for himself. Relief was refused, so far as the doctrine now under consideration was applied, because, to have given them relief would have been to sanction the nefarious transaction in the court. No such result will ensue in this case.

Demurrer overruled.

MEYER, WEIS & Co. v. GATEUS.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. PRACTICE—SET-OFF—EFFECT OF DISMISSAL BY THE PLAINTIFF.—

Where the defendant has filed a plea of set-off, if the plaintiff voluntarily dismisses his suit, as he may under the Tennessee statute, the defendant may elect to proceed on his plea of set-off in the capacity of plaintiff, and the cause will be tried as if he had brought an independent suit on his counter claim.

George Gillham, for defendant.

L. Lehman, for plaintiffs.

HAMMOND, D. J. At a former day of this term the plaintiffs dismissed their suit, and now the defendant, who had filed a plea of set-off, moves to re-instate the case upon the trial docket for the purpose of trying the issues made upon his plea of set-off. The Tennessee Code, in the chapter regulating the trial and its incidents, provides that "the plaintiff may, at any time before the jury retires, take a nonsuit, or dismiss his action, as to any one or more defendants; but, if the defendant has pleaded a set-off or counter claim, he may elect to proceed on such counter claim in the capacity of a plaintiff." T. & S. Code, 2964. The chapter on pleadings in civil actions, in the article on the plea of set-off, had provided that "if the debt or demand so offered to be set off exceed the amount of the plaintiff's demand, such excess being found by the jury, judgment shall be rendered against the plaintiff in favor of the defendant for such excess, and all costs." T. & S. Code, 2922.

In construing this latter section the supreme court of Tennessee has repeatedly determined that if the plaintiff fails in his action to establish his claim, so that the judgment is that the defendant owes the plaintiff nothing, the defendant can recover nothing on his set-off, because he is allowed a judgment for the *excess* only. And it has been held that the provisions of section 2964, above quoted, have not changed this rule of decision. Whether this be the correct construction of the statute or not, it is too well settled to be now disturbed by

further judicial construction. The legislature has changed the rule, in actions before a justice of the peace, by amending section 4160 of the Code, and now, in those actions, "if the plaintiff fails in establishing any demands against the defendant," the defendant is nevertheless entitled to have judgment for whatever is due him on his cross-action. Acts 1879, c. 222, p. 265.

This act does not, however, apply to any suits except those commenced before a justice of the peace, and has not changed the rule under section 2922 of the Code. Why this distinction has been made we cannot tell, but in tracing these sections to their originals it will be seen that suits before justices of the peace have always been more favored than others in this matter of the defendant's rights under his plea of set-off, and it is plain this act has followed that distinction. The law, therefore, remains, in regard to this suit, as it stood prior to the act of 1879; so that, if the parties *go to trial* and the plaintiff fails in his action, the defendant can recover nothing on his set-off. *Henry v. Walker*, 11 Heisk. 194; *Baker v. Grigsby*, 7 Heisk. 627; *Railroad v. Galbraith*, 1 Heisk. 482; *Brazelton v. Railroad*, 3 Head, 570; *Edington v. Pickle*, 1 Sneed, 122; *Barnard v. Young*, 5 Humph. 100.

But in all these cases there was a trial before the jury or the justice, and it was held, under such circumstances, that the defendant cannot recover on his set-off if the plaintiff fails in his action; and in none of them did the plaintiff voluntarily dismiss his suit. Where he does this the rule is different, because, by the very terms of the statute, if the plaintiff dismisses his suit before the jury retires the defendant may elect to proceed on his set-off in the capacity of plaintiff. It is precisely this case to which the statute applies, and the decisions above referred to do not affect the question. It was held in *Riley v. Carter*, 3 Humph. 230, that after plea of set-off filed the plaintiff could not dismiss his suit at all; but the Code, § 2964, has changed this, and he may now do so, but with an express provision that if he does the defendant may proceed on his set-off. There is no difficulty in our practice in doing this, for the plea of set-off is in the nature

of a declaration on the counter claim. T. & S. Code, §§ 2918, 2932, 2940; *Ridley v. Buchanan*, 2 Swan, 555, 558.

The case should, therefore, be re-instated on the trial docket, and proceed on the plea of set-off as if the defendant were the plaintiff; but the order dismissing the plaintiff's action should stand as it is, the suit of the plaintiff having been dismissed by himself, as he had a right to do under the statute.

Motion granted.

BROWN v. MEMPHIS & C. R. Co.

(Circuit Court, W. D. Tennessee. August 6, 1880.)

1. PLEADING—TENNESSEE CODE.—Any declaration which states a cause of action, however informally, or any plea which states a defence either by way of general denial equivalent to the general issue or special plea showing the facts constituting the defence, will be good under the Tennessee Code, whether good at common law or not.
2. CARRIER—REASONABLE REGULATION—HOW DETERMINED.—Where a woman was excluded from the "ladies' car" because she was of notoriously bad character, the defendant pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it. *Held*, that it is a mixed question of law and fact whether the regulation is reasonable or not, to be submitted to the jury, on proper instructions by the court, and that it will not be determined on demurrer.

Inge & Chandler, for plaintiff.

Humes & Poston, for defendant.

HAMMOND, D. J. This is an action for wrongfully, and with unnecessary force, ejecting the plaintiff from the defendant's cars, and has been heard upon demurrer to the pleas. The grounds of objection arising out of the form and substance of the pleas would be good, perhaps, if the pleadings were to be tested by the common law, but, under the Tennessee Code, they are not well taken. Any declaration which states a cause of action, however informally, or any plea which states a defence either by general denial equivalent to the general issue, or special plea showing the facts, will be good, whether

good at common law or not. Code, (T. & S. Ed.) 2884, 2913, 2917a; Car. Hist. Lawsuit, §§ 206, 209, 844.

The second plea, which avers that the plaintiff is a colored woman, and sets up a regulation requiring colored people to occupy separate cars equal to those provided for white people, has been withdrawn, because, as stated by counsel, this company has no such regulation, people of all colors being admitted to their cars without classification or distinction on account of color.

This leaves for present consideration only the question arising on the third plea, which is as follows: "And, for a further plea in this behalf, defendant says that, by a customary regulation of the defendant, a certain car in the defendant's passenger train, commonly called the ladies' car, was set apart to be exclusively used and occupied by persons of good character, and genteel and modest deportment, from which said car it was, by said regulation, the duty of defendant's conductor to exclude all persons of improper character, or addicted to deportment offensive to modesty and decorum. Yet the plaintiff, at the time of her alleged grievance, being a notorious courtesan, addicted to lascivious and profane conversation and immodest deportment in public places, and well known to the defendant's conductor as such, and well knowing the regulation aforesaid, and well knowing that there were other good and comfortable passenger cars, of equal accommodations with the one provided for the ladies, in said train, whereon she could be safely and securely carried without violation of the regulation aforesaid, notwithstanding intruded herself into said ladies' car, and being then and there by the conductor advised of said regulation, and politely requested to remove into another good, safe, and comfortable car, of ample accommodations, in said train, peremptorily refused, and persisted in refusing, whereupon, with gentle hands and without unnecessary force, the conductor removed the plaintiff from the ladies' car, and tendered her accommodation in the said other car, which refusing, the plaintiff left the train," etc.

The plaintiff alleges, in the declaration, that she had purchased of the agent of the defendant a first-class ticket from Corinth to Memphis, and took her seat in a car, from which with, as is alleged, brutal violence, she was ejected. The demurrer insists that the plea shows no ground of defence, and it is argued for the plaintiff that she was not subject to exclusion except for improper conduct exhibited in the car at the time, and by this plea none is alleged. The argument is that the carrier could not refuse to carry her, as long as she behaved properly on the train, because of her alleged bad character, nor exclude her for that cause after having made the contract by the sale of the ticket; at least, not without tendering back the fare, which is not averred in the plea. It does not seem to me that these are the issues tendered by the plea. The conductor did not, according to the allegations of the plea, refuse to carry the plaintiff, as by the contract she was entitled to be carried, for the plea avers a tender of first-class accommodations, which were refused.

The declaration is carefully worded, so as to charge that the plaintiff was excluded from *a car*, and avers that defendant refused to carry her "on or in said car," and ejected her with such brutality that she abandoned her trip. This excessive force is denied by the plea, but ejection from "the ladies' car" is confessed, and sought to be avoided by pleading a regulation forbidding the plaintiff to ride on that particular car because of her bad character. The demurrer, in legal effect, confesses that there was such a regulation as the plea avers, and that the plaintiff was of the bad character charged. The only question, therefore, is, was this a reasonable regulation? Can a carrier set apart a car for the exclusive use of persons "of good character, and genteel and modest deportment," and exclude from that car all persons "of improper character, or addicted to deportment offensive to modesty and decorum," without reference to their demeanor at the time they take passage in the car, and require such persons, although well-behaved at the time, to occupy another car not so exclusive in regard to the persons permitted to occupy it?

In New Jersey this is held to be a question of fact for the jury to decide. The court says: "It must, from its very nature, be a question of fact rather than of law. The reasonableness or unreasonableness of the regulation is properly for the consideration, not of the court, but of the jury." *State v. Overton*, 4 Zab. 435-441; *Morris Railroad Co. v. Ayres*, 5 Dutch. 393.

In *Bass v. Railroad*, 36 Wis. 450, it is said "to partake of the character of debatable ground between court and jury, and is so properly held to be a mixed question of fact and law; and it is always proper to submit the question, under instructions, to the jury." Page 459. And in *Day v. Owen*, 5 Mich. 520, it is said: "In pleading, it is sufficient to state the rule or regulation, that plaintiff comes within it, and to aver its reasonableness. It is not necessary to spread upon the record the facts, which may be more or less numerous, that the party relies on to establish its reasonableness. It is otherwise where the defendant refuses to carry the plaintiff generally. In such cases, the facts constituting his excuse, if he have one, must appear on the record, that the court may determine whether it be good or bad. But the reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court. It may depend on a variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively." Page 527. And it was held in that case that the question would not be determined on demurrer.

Demurrer overruled.

NOTE. See *Thomp. Carr. Pass*, 306.

LATHROP and others v. THE JUNCTION RAILROAD COMPANY
and others.*

(Circuit Court, E D. Pennsylvania. October 28, 1880.)

1. RAILROAD—OWNERSHIP OF SECTION OF ROAD FORMING PART OF THE LINE OF ANOTHER COMPANY IN WHICH IT IS A STOCKHOLDER—RIGHT OF LATTER COMPANY TO USE SUCH SECTION—PRELIMINARY INJUNCTION.—A railroad was built for the purpose of uniting three other roads, which were the principal owners of its corporate stock. One of these three other roads allowed a portion of the uniting road to be located over its property, and built that portion at its own expense. Subsequently it claimed the exclusive control over that portion, and refused to allow the uniting road to transport freight and passengers thereon. *Held*, that although it might have a proprietary right in that portion of the road, it was bound to allow the uniting road a reasonable use thereof, as a part of the latter's continuous line. *Held*, further, that the right to such use might be enforced by a preliminary injunction restraining the company owning the portion of road from interfering with the transportation of the freight and passengers carried by the uniting road.

Motion for a Preliminary Injunction.

This was a bill in equity filed by two stockholders of the Junction Railroad Company against the Junction Railroad Company and the Pennsylvania Railroad Company. The bill alleged that the Junction Railroad Company was by law obliged, under certain regulations, to transport freight and passengers over its road, but that it had, in consequence of a claim of the Pennsylvania Railroad Company to the exclusive property in and control over a portion of its road, refused to transport freight of the Baltimore & Ohio Railroad Company, in course of transmission from Baltimore to New York, by means of a route in which the Junction Railroad was a connecting link. The bill prayed for an injunction restraining the Junction Railroad Company from declining or refusing to transport such freight, and restraining the Pennsylvania Railroad Company from interfering with such transportation.

The Pennsylvania Railroad Company filed an answer asserting an exclusive right to and over a section of road form-

*Prepared by Frank P. Prichard, Esq., of the Philadelphia bar.

ing a portion of the line known as the Junction Railroad, and denying that there was any duty or liability on the part of the Junction Railroad Company to transport freight or passengers over such section.

The pleadings and affidavits disclosed the following facts: The Pennsylvania, the Philadelphia & Reading, and the Philadelphia, Wilmington & Baltimore Railroad Companies operated respectively three lines of railroad, terminating in the city of Philadelphia, east of the Schuylkill river. In the year 1860 a charter was obtained from the legislature for a corporation to be known as the Junction Railroad Company, with power to build a road on the west bank of the Schuylkill river, from a point on the Philadelphia & Reading Railroad to a point on the Pennsylvania Railroad, and from thence to a point on the Philadelphia, Wilmington & Baltimore Railroad, thus connecting those three roads, and allowing an interchange of freight and passengers without a transfer through the populous parts of the city. Under this charter and various supplements the road was built, and bonds to the extent of \$800,000, secured by mortgages covering the entire line of road, were issued to defray the cost. With the exception of a few shares held by individuals, the stock of the company was all taken and held by the three railroads above named. During the construction of the road the president, secretary, and chief engineer of the company were officers of the Pennsylvania Railroad Company. In constructing the Junction Railroad a portion of its middle section was built upon ground owned by the Pennsylvania Railroad. In the year 1866 a dispute arose between the Junction Railroad and the Pennsylvania Railroad as to the ownership of this portion of the road, the latter company claiming that it had constructed this portion of the road at its own expense, and was the sole owner thereof. This dispute was terminated by a decision of the supreme court of Pennsylvania (*Pennsylvania R. Co.'s Appeal*, 80 Pa. St. 265) that this portion of the road was the property of the Pennsylvania Railroad Company, without prejudice, however, to the right of the Junction Railroad Company "to assert either at law or in equity any right

or rights (if any they have) relating to the use of" the said portion of the road.

By the leasing of different lines connecting the cities of Philadelphia and New York, the Pennsylvania Railroad Company and the Philadelphia & Reading Railroad Company became competing lines as to freight brought from the west over the Baltimore & Ohio Railroad and destined for New York. The Pennsylvania Railroad Company thereupon refused to allow the Junction Railroad Company to transport passengers or freight over the portion of the track above referred to.

Two of the individual stockholders then filed the present bill. At the same time similar bills were filed against the same defendants by the Baltimore & Ohio Railroad Company and by the Central Railroad Company of New Jersey.

Upon the argument it was contended on the part of the Pennsylvania Railroad Company not only that it had an exclusive right to the portion of road owned by it, but that, however this point might be finally decided, no preliminary injunction of the nature of the one asked for by complainants could be issued under the circumstances of this case.

E. G. Platt, Samuel Dickson, and John C. Bullitt, for the complainants.

James E. Gowen, for Junction Railroad Company.

Wayne MacVeagh and Chapman Biddle, for Pennsylvania Railroad Company.

MCKENNAN, C. J. It is no part of my present purpose to notice any other than the main question in this case. It is sufficient for me to say, as to several other questions discussed by counsel at the argument, that, in my opinion, the court has power to grant the preliminary relief prayed for, and that the alleged impending injury to the interests of the complainants is of such a character as to entitle them to invoke the interposition of the court.

The Junction Railroad Company is a corporation created by a special act of the Pennsylvania legislature, dated May 30, 1860, whereby it was authorized to "construct a railroad commencing at a point upon the Philadelphia & Reading Railroad, at or near the bridge of said company, near Peters

island, in the river Schuylkill; thence by the best route to a point upon the line of the Pennsylvania Railroad, within one mile east of George's run, at the village of Hestonville; thence by the line of the Pennsylvania Railroad, by the most direct and practicable route, to a point upon the line of the Philadelphia, Wilmington & Baltimore Railroad."

By a supplement to this charter, passed in 1861, the Junction Railroad Company was authorized to "make a complete line of railway from a point on the Philadelphia & Reading railroad, at or near the bridge at Peters island, to a point on the Philadelphia, Wilmington & Baltimore Railroad, at or near Gray's ferry bridge, by the most convenient and practicable route."

By further legislation the company was authorized to borrow \$500,000 upon mortgage of its property and franchises, and, upon this security, a loan of that amount was negotiated upon the authorized guaranty of it by the three companies named.

The stock of the company was taken and is now held by the Pennsylvania Railroad Company, the Philadelphia & Reading Railroad Company, and the Philadelphia, Wilmington & Baltimore Railroad Company, except a few shares which are held by individuals.

At the organization of the company, in 1861, the president of the Pennsylvania Railroad Company was elected its president, and occupied that position until 1867, during which time the whole line of its road was located definitely between its prescribed *termini*. Under his direction a large sum, to-wit, about \$870,000, was expended in its construction, and the whole of the road, except that part between Market and Thirty-fifth streets, was completed by it.

This intervening part was constructed by the Pennsylvania Railroad Company, and was held by the supreme court of Pennsylvania to be the property of that company, and this decision must be regarded as conclusive so far as the legal ownership of that link is concerned. But, in view of the admission that the Junction Railroad may have rights touching the use of the section of road referred to, the decree was

entered without prejudice to such rights, or to the assertion of them in appropriate proceeding.

Various other facts are alleged in the bills of complaint, and are verified by the accompanying affidavits, which, all together, constitute a "strange, eventful" history of the construction of the road.

Enough of them have been here stated to indicate the vital object, and the essential importance to the public of the construction of the road.

The Pennsylvania, the Philadelphia & Reading, and the Philadelphia, Wilmington & Baltimore Railroads terminated at Philadelphia. They were unconnected with each other, and so the immense traffic requiring transfer from the one to the other was necessarily conducted with great expense, inconvenience, and embarrassment. These difficulties could be almost entirely avoided by the construction of a continuous line, only about four miles long, from Gray's ferry to Peters island, and accordingly the Junction road was projected and made. A broken line, with a gap in the middle of it, would not answer the purpose; its continuity was absolutely essential to effectuate the object of its creation, as well as to meet the just expectation of its stockholders and the public. So, in the annual report of the Pennsylvania Railroad Company, February 3, 1862, it is said: "The Philadelphia, Wilmington & Baltimore Railroad Company, the Philadelphia & Reading Railroad Company, and the Pennsylvania Railroad Company have organized the Junction Railroad Company, under a charter procured from the legislature of 1860, and amended at the last session. The object of this line is to connect these three railroads by a *continuous* line along the west bank of the Schuylkill river, from the Reading Railroad, near Peters island bridge, to the Philadelphia, Wilmington & Baltimore Railroad, at Gray's ferry, *intersecting the Pennsylvania Railroad near the wire bridge at Fairmount*, so that an interchange of freight between these lines may be effected without passing through the populous portions of the city."

In apparent accordance with the declaration, were all the acts and declarations of the Pennsylvania Railroad Company

during the progress of construction, until the controversy arose as to the ownership of the middle section, and they may, therefore, be fairly regarded as in a great measure inducing the expenditure of the large sum laid out by the Junction Railroad in its line. Any other hypothesis must assume that the Junction Railroad Company was willing to imperil the chief object of the enterprise, and the value of its investment, by making itself entirely dependent upon the arbitrary will of the owner of the middle section for the profitable use and enjoyment of the two other sections of the line.

Ought the Pennsylvania Railroad Company, then, to be permitted so to control the section of the road of which it is the proprietor as to exclude the Junction Railroad Company from participation in its use as part of a continuous line? I think not. It must be treated, in equity, as having agreed to such reasonable use of the section owned by it as is necessary to effectuate the common object of those who furnished the means of constructing the Junction Road as a continuous line; and, to that extent, to a modification of its proprietary rights. It would certainly be unwarrantable in the Junction Company to exclude the Pennsylvania Railroad Company from the beneficial use of the northern and southern sections of the Junction Road, either by denying it altogether, or by imposing burdensome restrictions upon it. Why ought not a like measure of justice be meted out to the other interests associated with the Pennsylvania Company, in reference to the middle section of the Junction Road, when it induced these interests to make large expenditures of money and incur large liabilities, upon the faith that this middle section should constitute an indispensable constituent of a joint enterprise? There is no just ground for any discrimination.

While I am of opinion that the Junction Railroad Company may have the right to employ its own motive power over the whole line between its *termini*, yet I think the operations of the road should be conducted with as little friction as possible, and without any avoidable abridgment of the proprietary rights of the Pennsylvania Railroad Company. The injunc-

tion granted, therefore, will not restrain that company from operating its own portion of the line with its own motive power.

1. And now, October 28, 1880, it is ordered and decreed that an injunction be granted, until further order of this court, enjoining and restraining the said Junction Railroad Company, its officers, servants, and agents, from declining or refusing, or in any manner failing, to perform the duties required of them by the charter of said company, and especially from declining or refusing to furnish motive power, haul, receive, ship, or transport over its road freight or passengers arriving in cars by the Philadelphia, Wilmington & Baltimore Railroad destined for the Philadelphia & Reading Railroad or its connections, or from declining or refusing to furnish motive power, haul, receive, ship, or transport freight or passengers arriving in cars by the Philadelphia & Reading Railroad destined for the Philadelphia, Wilmington & Baltimore Railroad or its connections.

2. That the said Pennsylvania Railroad Company, its officers, agents, and servants, be enjoined and restrained from interfering with, or in any manner hindering, the said Junction Railroad Company from performing its said corporate duties, and transporting freight and passengers as aforesaid.

3. This injunction shall not be taken to restrain the said Pennsylvania Railroad Company from furnishing exclusively the motive power to transport the cars aforesaid over and upon that portion of the Junction line which is situated between the north side of Market and Thirty-fifth streets in the city of Philadelphia.

LINDSEY, Assignee, etc., v. THE LAMBERT BUILDING & LOAN ASSOCIATION.

(District Court, W. D. Pennsylvania. October 8, 1880.)

1. BUILDING ASSOCIATION—TITLE TO BANK DEPOSIT.—C., the treasurer of a building and loan association, a corporation, who had received over \$6,000 of the moneys of the association, opened an account in bank in his name as treasurer of the association, and in that name and title deposited \$6,000, taking therefor a certificate of deposit, payable him as such treasurer. *Held*, that the money so deposited became *eo instanti* the property of the corporation, and no subsequent act of ratification on its part was necessary to complete its title to the fund.
2. SAME—BANKRUPTCY—PREFERENCE.—At the time of the deposit C. was in good financial credit, but, in fact, was insolvent, and upon a creditor's petition, filed within 60 days thereafter, was adjudged a bankrupt. The deposit was the voluntary and unsolicited act of C., and at that time no member of the association or officer (other than C. himself) knew of or had any reason to suspect C.'s insolvency or intention to give a preference to the corporation. The corporation had not authorized C. to use its funds or commingle them with his own, and had no knowledge of any such breach of duty on his part. *Held*, that the corporation was not chargeable with C.'s knowledge of his insolvency and intention to give a fraudulent preference.
3. SAME—SAME—SAME.—The corporation, not otherwise having any cause to believe C. to be insolvent, or knowledge that the deposit was made in fraud of the bankrupt act, *held*, that the assignee in bankruptcy could not impeach the deposit as an unlawful preference.

The facts of this case appear in the following charge of the court to the jury.

D. T. Watson and Knox & Reed, for new trial.

T. C. Lazear, *contra*.

ACHESON, D. J., (*charging jury*.) In order to invalidate, as a fraudulent preference under the bankrupt law, a payment made or security given for a debt, it is not enough to show that the debtor was insolvent at the time of the payment or transfer, and that the same was made by him with a view to give a preference to the creditor; but it must also appear that the creditor at the time had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, and knew that the payment or transfer was made in fraud of the law. It

has been held by the supreme court of the United States (*Grant v. The Nat. Bank*, 97 U. S. 80) that it is not sufficient that the creditor may have had some cause to suspect the insolvency of his debtor. The court, in that case, say: "Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside."

In the present case, under all the evidence, the material facts are not the subject of dispute. William F. Casey, for several years prior to August 13, 1875, had been the treasurer of the defendant corporation, the Lambert Building & Loan Association, receiving and disbursing from time to time its funds. Prior to the date mentioned he had never kept any separate bank account of the funds of the association. He kept individual bank accounts in the Anchor Savings Bank and the City Savings Bank. On the date mentioned (August 13, 1875) he had in his hands of the moneys of the association an amount slightly exceeding \$6,000. On said date he went to the Bank of Pittsburgh and opened an account in the name of W. F. Casey, treasurer of the Lambert Building & Loan Association, and deposited in that name and title \$6,000, and took a certificate of deposit for the same to "W. F. Casey, treasurer of Lambert Building & Loan Association." He was at this time in good financial credit, and no member or officer of the association (except himself) had any knowledge whatever of his insolvency, or had any reason to believe or suspect him to be insolvent. He was in fact then insolvent, as the sequel showed, but this was known only to himself. The next day, August 14, 1875, Casey went to the office of S. A. Johnson, Esq., the solicitor of the association and its secretary, asked him what was the balance appearing against him on the books, and stated that he wished to pay it over, and resign his office of treasurer. Johnson asked him why he did this? To which he replied he would tell him again. Mr. Johnson having informed him of the exact balance due the association, Casey indorsed said certificate of deposit as follows:

"Pay to the order of Wm. J. Flynn and S. A. Johnson, president and secretary of the Lambert Building & Loan Association.

W. F. CASEY,

"Treasurer of Lambert Building & Loan Association.

"*Aug. 14, 1875.*"

—and delivered the certificate so indorsed to Johnson. He also paid the latter a small sum of money, in full of the balance due by him as treasurer, and took Mr. Johnson's receipt in full. At the same time Johnson drew up, and Casey signed and handed Johnson, his resignation of the office of treasurer of the association. Down to the close of this transaction it does not appear that Johnson, or any member or officer of the association, except Casey himself, had any knowledge or information whatever of Casey's insolvency. But later, on the same day, (whether before Casey left Johnson's office, or at a second visit, does not clearly appear,) he informed Johnson that he was in pecuniary difficulties.

The money deposited in the Bank of Pittsburgh was not drawn from that bank until August 18, 1875, when it was drawn by S. A. Johnson, secretary, and George F. Ewens, vice-president, of the association, both of whom then knew of Casey's insolvency. The latter executed a deed of voluntary assignment, for the benefit of his creditors, on August 19, 1875. On the twelfth of October, 1875, certain of his creditors filed a petition against him for his adjudication as a bankrupt, and he was subsequently so adjudicated.

The present action is by his assignee in bankruptcy to recover the \$6,000 deposited as already mentioned in the Bank of Pittsburgh. The right of the plaintiff to recover depends, I think, upon the determination of the question, when did the title to the fund in controversy vest in the Lambert Building & Loan Association? I am of opinion that it so vested at the time of the deposit on August 13, 1875.

It is argued that some affirmative act of ratification on the part of the association was necessary before the title to the fund vested in the association, and that no such act has been

shown until the money was drawn out of bank by the vice-president and secretary, both of whom then had knowledge of Casey's insolvency, and that ratification was then too late. But I cannot adopt this view. In opening the account at the Bank of Pittsburgh and making the deposit for the benefit of the association, Casey merely performed a duty he owed the association. He should, from the first, have kept the moneys of the association separate and apart from his own. The Bank of Pittsburgh was a safe and proper place of deposit for the money of the association. Had he died immediately after the deposit it would hardly be pretended that the fund so deposited would have passed to his personal representative.

I affirm the defendant's third point, viz.: "that, under all the evidence in the case, the verdict should be for the defendant."

Under the undisputed facts, and for the reasons already stated, I refuse the plaintiff's several points.

The jury having found a verdict for the defendant, the plaintiff moved the court for a new trial, which after argument was refused, the court filing the following opinion, October 8, 1880:

ACHESON, D. J. I adhere to the opinion I entertained at the trial, that when W. F. Casey deposited the \$6,000 in the Bank of Pittsburgh to his credit, as treasurer of the Lambert Building & Loan Association, taking the certificate of deposit payable to his order as such treasurer, the money became *eo instanti* the property of the defendant corporation. Confirmatory of this view is the case of *Stapleton v. Stapleton*, 14 Simons, (Eng. Ch. R.) 186. It must be remembered that Casey was the mere custodian of the moneys of the association, and at all times should have kept the trust fund distinguishable from his own moneys and separate therefrom. Hence, when he made the deposit in the Bank of Pittsburgh, he merely restored to the trust fund its ear-mark, which it had temporarily lost by reason of his unauthorized act in mixing the trust moneys with his private funds. To use the language

of the lord chancellor, in *Ex parte Sayers*, 5 Ves. 169, 172, "if the money got into the general fund, it got out again." It seems to me, therefore, that the title to the deposited fund vested immediately in the association, and no act of ratification on its part was necessary to complete the transaction.

It is, however, urged with great earnestness that if the foregoing view is correct the deposit in question was an unlawful and void preference. But to avoid a preference as fraudulent under the late bankrupt law, it must appear that the party receiving it, or to be benefited thereby, had at the time reasonable cause to believe that the debtor was insolvent, and knew that the payment or security was made or given in fraud of the act. In *Clark v. Iselin*, 21 Wall. 360, 375, after stating what must concur in order to avoid a preference, Judge Strong says: "In fine, there must be guilty collusion to constitute the fraudulent preference condemned by the statute." That case arose under the thirty-fifth section of the original act, but the amendment of June 22, 1874, went further to uphold preferences than did the original act. "Having reasonable cause to believe that such person is insolvent, and knowing that such * * * payment, pledge, assignment, or conveyance is made in fraud of the provisions" of the act, is the language of the amendment. Reasonable cause to believe that insolvency exists, and knowledge of a fraudulent intent to give a preference, must both be shown. Now, if under the original act it was necessary to show "guilty collusion" in order to set aside a preference, much more is it necessary under the amended act. But where is there any evidence tending to show "guilty collusion" between W. F. Casey and the Lambert Building & Loan Association? Throughout this whole transaction the good faith of the association is conspicuous. As already observed, Casey was the mere custodian of the moneys of the association. It was not intended that the relation between him and the corporation should be that of debtor and creditor. The association did not contemplate that Casey should use the trust funds or commingle them with his own, and at the time the deposit was made had no actual knowledge that he had violated his

duty in the premises. Moreover, at that time no member or officer of the association, other than Casey himself, had any suspicion of the latter's insolvency, or knew of his intent to give a preference to the corporation. It is quite certain that if the relation between Casey and the association had been simply that of debtor and creditor, the payment by him to the corporation of this money, under the circumstances disclosed by the evidence, could not have been impeached as an unlawful preference.

But it is contended that inasmuch as Casey was treasurer of the corporation his knowledge of his insolvency and intention to give a fraudulent preference was the knowledge of the corporation. Upon what principle, however, is the association chargeable with knowledge of Casey's insolvency? What interest had the corporation in his private affairs? He being the mere custodian of the moneys of the association, how did it concern the latter whether he was solvent or insolvent? Furthermore, Casey's knowledge of his insolvency was not acquired by him while acting in his capacity of treasurer; nor was he bound to communicate the fact to the corporation. But if the information was not acquired by him in the course of his duties as treasurer, and he was under no obligation to communicate it to the corporation, then the latter is not chargeable with constructive notice of his insolvency. *Philadelphia v. Lockhardt*, 73 Pa. St. 211; Wharton on Agency, § 178.

Undoubtedly the general rule is that notice to, or knowledge acquired by, an agent in the course of the transaction in which he represents his principal binds the latter. Therefore, where a creditor secured a preference from an insolvent debtor through the intervention and by the solicitation of an agent, the knowledge of such agent was held to be the knowledge of his principal. *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 181. But in the present case, in making the deposit in the Bank of Pittsburgh, Casey was acting for himself and not as agent for the corporation. The latter was not seeking any preference. The association had not solicited the deposit. It was the voluntary act of Casey. The motive

which induced him to take this step, it may well be supposed, was altogether a personal one, viz.: his desire to escape the criminal consequences of the embezzlement of trust funds.

It is a well-recognized rule that neither the acts nor knowledge of the officer of a corporation will bind it in a matter in which he acts for himself and deals with the corporation as if he had no official relations to it. *Angell & Ames on Corp.* § 308; *Winchester v. Balt. & S. R. Co.* 4 Md. 231; *Commercial Bank v. Cunningham*, 24 Pick. 270; *Stevenson v. Bay City*, 26 Mich. 44; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. (Law) 435; *Barnes v. The Trenton Gas-light Co.* 12 C. E. Green (N. J. Eq.) 33. Thus, where the general superintendent of a corporation conveyed land to it, the corporation, it was held, was not chargeable with his knowledge of an adverse claim to the land. *Wickersham v. Chicago Zinc Co.* 18 Kan. 481. The corporation agent's knowledge, when acting for himself, is not the knowledge of the corporation. *Id.* I hold the present case to fall within this principle.

If my agent, who had fallen in arrears in his accounts, had voluntarily made me a payment during the life-time of the bankrupt law, would any one pretend that I could be deprived of the benefit of such payment upon the ground of constructive notice of his insolvency and intent unlawfully to prefer me, if in fact I were ignorant thereof and free from guilty collusion with such agent? And why should the defendant corporation, upon the ground of imputed knowledge, be compelled to surrender a preference which it acquired innocently, and without actual knowledge of any intended fraud upon the bankrupt law? Having obtained the fund in controversy honestly, the defendant can in good faith retain it.

The motion for a new trial is denied; and it is ordered that judgment for the defendant be entered upon the verdict.

DOWNIE v. DOWNIE.

BISSELL and others v. DOWNIE and others.

(Circuit Court, D. Indiana. —, 1880.)

1. **WILL—CONSTRUCTION—LIFE ESTATE—POWER TO SELL IN FEE.**—A will contained the following clause: "I give and devise to my honored mother, Melissa E. Downey, all my property and estate, both real and personal, to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and to appropriate the proceeds to her own use and benefit; and all deeds and conveyances of real estate by her made shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee. Should my mother die first, then, and in that case, I devise all the remainder of my estate to Charles Lindley Downey. After the death of my mother, I devise all of the said estate to my half-brother, Charles Lindley Downey." *Held*, that Mrs. Downey had an estate for life in the property devised, with the power under the terms of the will to dispose of it for the purposes named.
2. **SAME—SAME—POWER TO MORTGAGE.**—*Held*, further, that such power did not, in the first instance, include a power to mortgage.

In Equity. Demurrer to Bill.

Herod & Winter, for plaintiffs.

Harrison, Hines & Miller, for defendants.

DRUMMOND, C. J. The plaintiff filed a bill for the purpose of quieting his title to certain tracts of land which he claimed under the will of Alanson G. Stevens; and George P. Bissell, one of the defendants, having advanced a large sum of money to Mrs. Downie, also a devisee under the same will, the latter of whom had executed mortgages to him for the purpose of securing the sum advanced. A bill in the nature of a cross-bill is filed by Bissell for the purpose of foreclosing the mortgages, or one of them, if only one of them shall be considered as valid. And the question arising in the case is under the will made by Stevens. So far as it is necessary to consider it for the purpose of deciding the matter in controversy here, the will is as follows:

"I give and devise to my honored mother, Melissa E. Downie, all my property and estate, both real and personal, to hold and enjoy the same during her life, with full power to sell the same, or any part thereof, and to appropriate the proceeds to her own use and benefit; and all deeds and con-

veyances of real estate by her made shall pass a title in fee to the purchasers, it being my will that she shall enjoy the same as though it were devised to her in fee. Should my mother die first, then, and in that case, I devise all the remainder of my estate to Charles Lindley Downie, (the plaintiff in the original suit.) After the death of my mother, I devise all of the said estate to my half-brother, Charles Lindley Downie; and should he die before attaining the age of 21 years," then the property is devised to other parties.

The first question is whether Mrs. Downie, the devisee under this will, had an estate for life in the property devised, or an estate in fee. I think she had an estate for life only, with the power under the terms of the will to dispose of it for the purposes named; and that if the property was not sold, as was provided for in the will, whatever should remain after her death should become the property of his half-brother, Charles Lindley Downie. Of course, the matter in controversy turns upon the question whether or not the power authorized the mortgage of the property merely. In the first place—to analyze the language of the will—he devised all his property to Mrs. Downie, his mother, during her life. If it had stopped there it would clearly be nothing but a life estate. He then declares that, having devised it to her for life, she shall have full power to sell the same, or any part thereof, and appropriate the proceeds to her own use and benefit. But, lest there might be some ambiguity about that language, he proceeds to render his meaning clear by declaring that all deeds and conveyances of real estate by her made, under this full power to sell, shall pass a title in fee to the purchaser. That renders it clear that his intention was, in giving her power to sell, not to sell merely during her life the life estate which he had previously given her, but to sell in such a way that the absolute fee-simple in the land would be passed. The deeds and conveyances which were to be made under this power to sell were, in the language of the will, to "pass a title in fee to the purchaser." Does the language following that which has already been cited enlarge the scope of that which precedes it, it being mentioned

in the will that she shall enjoy the same as though it were devised to her in fee? The first observation to be made on this language is that she is to have the enjoyment of it as though it were devised to her in fee; and how was she to have the enjoyment of it as though it were devised to her in fee? It seems to me, clearly, by executing the power which has already been conferred upon her, viz.: by selling the land, and, when sold, that the deeds and conveyances shall pass a title in fee to the purchaser. In that way she has the right to appropriate the proceeds to her use and benefit as though it were devised to her in fee. It has been assumed by the counsel on both sides that the language which follows that last cited means that, in case his mother died before he did, the remainder of the estate was to go to Charles Lindley Downie. I am not so clear that that is what this language means. "Should my mother die first, then, and in that case, I devise all the remainder of my estate to Charles Lindley Downey."

There may be, I think, great force in the position that it includes not only the case of the death of his mother before his own death, but also the death of his mother before the death of Charles Lindley Downie, he surviving her. In no other way can we give any meaning to the words, "all the remainder of my estate." I do not think it is material, so far as the question now before the court is concerned, whether one or the other be the true construction of this last clause of the first item of the will. I only refer to it for the purpose of showing what were the intentions of the testator—that he meant to provide not only for his mother, giving her full power over the property to sell the same during her life, but, also, if any remained unsold and unused by her, that it should go to the benefit of Charles Lindley Downie. And that is emphasized by the first clause in the second item of the will: "After the death of my mother, I devise all of the said estate to my half-brother, Charles Lindley Downey."

It is impossible, I may add, to give any effect to this last clause of the will, upon any other assumption than that the mother had only a life estate, with the power to sell as already

declared. Then, did this give the power to mortgage the estate? Not in terms. It must be borne in mind that in Indiana a mortgage does not convey the land, but is only a security. I do not say that under no circumstances could Mrs. Downie mortgage any portion of this property. It seems to me that under certain circumstances the court might hold, for the purpose of giving effect to the language of this will, that she might have power to do so. Even conceding that the language of the will restricted her to the sale of the property, and did not expressly give the power to mortgage, on the principle that the general will of the testator should prevail rather than the particular will,—that the main object he had in view, which was to provide for the support of his mother, should be carried into effect,—a court of equity might so hold. But, according to the view which I take of the true construction of this will, the bill as it now stands is demurrable, and the demurrer must be sustained. It does not appear by the allegations of the bill that there was anything more than a mere loan of the money to Mrs. Downie, and a mortgage taken for its security. I hold that the bald statement upon its face is not a proper execution of the power contained in this will, and therefore that the demurrer to the bill must be sustained.

There may be a question whether the bill is amendable under the facts, but that point may be reserved. In taking the view which I do of the meaning of this will, it seems to me I carry out the principle adopted by Lord St. Leonards in the case of *Stoughill v. Anstey*, 1 De Gex, M. & G. 634.

It is said that in this bill it is alleged that the money was advanced to Thomas Cottrell and Melissa E. Downie. This is so, I believe. Whether or not, consistently with that statement, the bill can be amended, may be questioned; but I shall sustain the demurrer, with leave to the plaintiff to amend, and it is desirable that the real facts which actually exist in the case may be presented upon the record, so that the court may pass upon them, under this clause of the will, and determine whether or not Mrs. Downie had the right to make the mortgage.

I have no doubt of this: Assuming she had the right to mortgage the property, in order to effectuate the general purposes of the will as for her maintenance, if an imperfect mortgage or security were given, she had the right to perfect it, and make it a complete mortgage. If there was any error, omission, or imperfection in the first mortgage, it could be removed by a second.

MACK & Co. v. LANCASHIRE INS. Co. and others.*

(Circuit Court, D. Missouri. —, 1880.)

1. **FIRE INSURANCE—ACTION ON POLICY—EVIDENCE.**—In an action upon an insurance policy the plaintiff is bound, in the absence of any admission by the defendant, to establish, by a preponderance of the evidence, (1) the execution of the policy, (2) the total or partial destruction of the insured property, (3) the amount of the loss or value of the insured property destroyed, (4) and such notice and preliminary proof of loss as the policy requires.
2. **SAME—"ACTUAL CASH VALUE."**—In such case the term "actual cash value" means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed.
3. **SAME—FRAUDULENT CLAIM.**—In order to establish the fact of a fraudulent claim, it must appear (1) that there was a false statement in the preliminary proof as to the value of the goods destroyed, and (2) that such false statement was made with knowledge that it was false, and with the intent to defraud the defendant by deceiving him as to the value of the goods.
4. **SAME—SAME.**—The mere fact that the loss is less than that stated in the preliminary proof, would not be sufficient to establish fraud, though if the discrepancy between the true value and that stated by the insured is large, it would be some evidence bearing upon the issue of fraud.
5. **SAME—ARSON—EVIDENCE.**—In a civil case the fact of arson need not be established beyond all reasonable doubt, but it must nevertheless be established by a clear preponderance of all the evidence adduced.
6. **SAME—VEXATIOUS DELAY—DAMAGES—EVIDENCE.**—In order to recover damages for vexatious delay in the payment of a policy, it must be shown that there was no reasonable ground for contesting either the validity or the amount of the claim.

* Two other companies were concerned as defendants.

Noble & Orrick, for plaintiffs.

O. B. Sansum, for defendant.

McCRARY, C. J., (*charging jury*.) These cases being all of like nature, and relating to the same questions, have been by the order of the court consolidated for the purpose of the trial, and are now to be submitted to you for your verdict upon the facts and in accordance with the law as given to you by the court. The plaintiff in an action of this character is, in the absence of any admission by defendant, bound to establish by a preponderance of evidence—*First*, the execution of the contract or policy of insurance sued on; *second*, the destruction, total or partial, of the property insured; *third*, the amount of the loss, or, in other words, the value of the insured property destroyed; *fourth*, that such notice and preliminary proof of loss as the policy requires has been given.

In these cases the defendants by their answers have admitted the execution of the contract or policy sued on, as well as the destruction by fire, as alleged by plaintiff, of the property insured. They have also admitted that notice and proof of loss were duly given in all the cases sued on, to which your attention will be called hereafter. The defendants say that the property destroyed (a stock of clothing) was not of the actual cash value stated by plaintiffs in their petitions, and this presents the first issue of facts for you to determine. You are to consider and decide, in the light of all the evidence, what was the fair and reasonable cash value of the property in the city of St. Louis on the fourth of April, 1879, when the fire occurred. In determining this question you will consider the character and quality of the goods, their cost, their condition, the state of the market, any decline or advance in value after purchase and before the fire, the invoices previously made and the proof of subsequent purchases, as well as all the facts and circumstances developed in the evidence and bearing upon the subject, and from all the evidence you will ascertain and by your verdict decide what was the actual cash value of the goods in the store of the plaintiff at the time of the fire and destroyed thereby. By the term "actual cash value" I mean the sum of money the goods would have

brought if sold in the city of St. Louis, on the fourth day of April, 1879, for cash, at the market price. Having thus ascertained and fixed the value of the property destroyed, your verdict will be for the plaintiffs in the sum so fixed, unless you find for defendants on one or more of the issues presented by the answers, to which your attention will now be called.

The defendants, in their several answers, allege that the plaintiffs made, under oath, a false and fraudulent claim, representing their loss to have been \$78,219.82, while in truth and fact their loss was only \$48,000, as plaintiffs well knew, and that this false statement was made with intent to induce defendants to believe that the value of the stock was larger than it was in fact, and was therefore a violation of one of the conditions of the policy. It is for you to determine whether this defence is established by the preponderance of the evidence. In order to find for defendants upon this issue you must believe from the evidence that the statements made under oath by plaintiffs, in their preliminary proofs, as to the value of their stock and the amount of their loss, were in some material point false, and also that they were fraudulent; that is to say, intentionally false, or made with the purpose of deceiving and defrauding. A claim honestly made will not render the policy void, even though such claim be erroneous by reason of some degree of exaggeration or overestimate; but if the insured made, with reference to the quality or value of the goods insured, a claim which he knew to be false and unjust, then he cannot recover anything.

In the event that you should find the loss to be less than that stated by the insured in their preliminary proof, that mere fact would not be sufficient to sustain the defence, though if the discrepancy between the true value, and that stated by the insured in their preliminary proofs, is large, this would be evidence bearing upon the issue of fraud, to be considered by the jury for what it is worth. In other words, you will perceive that the defendants, in order to succeed upon this issue, must satisfy you from the evidence—*First*, that there was a false statement in the preliminary proof as to the value of the goods destroyed; and, *second*, that such false statement was made

with knowledge that it was false, and with the intent to defraud the defendants by deceiving them as to the value of the goods. The value of a large stock of clothing, at a particular date, is of course to some extent a matter of opinion and of estimate, and it is not to be expected that different persons would fix it at exactly the same amount. Different persons might honestly differ as to what would be a true valuation. The question for you to determine in deciding this issue, therefore, is not whether the value fixed by plaintiff was the true value of the goods, but whether it was an intentionally false estimate and claim. Upon this question, which is one purely of fact, you are the sole and exclusive judges.

If you find that there was no exaggeration of the amount of the loss, you will, of course, have no occasion to consider the other question; but if you find that there was an exaggerated claim, then you will inquire as to the intent.

In case No. 1,489, against the Glens Fall Insurance Company, there is an allegation in the answer that the preliminary proof was not made in time; but the court instructs you that that this defence was waived if the defendant, or its agent, had possession of the books of the plaintiff, from which the loss was to be ascertained, and if by reason of such possession of said books the plaintiffs were deprived of the opportunity to make proof in time. It was also waived if the agent of the defendant agreed when he took possession of the books to waive the issue. As the defendants have introduced no testimony to contradict plaintiff's proof upon this point, which was full and explicit, you will of course find this issue for the plaintiffs.

This leaves for your consideration the further defence that the loss "was caused, occasioned, and brought about fraudulently by the direct agency, procurement, contrivance, and direction of the plaintiffs." This is equivalent to an allegation that the plaintiffs are responsible for the fire which resulted in the destruction of their property. This is, of course, a perfect defence, if proved; but before you can find for the defendants upon this issue you must be satisfied from the evidence that the charge is true. The fact of arson may be established by

circumstances, but they must be such as to establish the main fact, with reasonable certainty. A mere suspicion is not enough. The jury must be satisfied that the fact is established by a clear preponderance of the evidence adduced before them.

In a case where the evidence is evenly balanced, or the jury is in doubt as to what the truth is on that point, there is not a preponderance of evidence. The defendants are not bound in a case like the present, as they would be in a criminal prosecution for arson, to prove the fact beyond all reasonable doubt, but they are required to produce proof sufficient to clearly satisfy the jury that the charge is true.

The jury will, if they find for plaintiffs, find and state in their verdict the value of the entire stock destroyed, with interest, as hereinafter stated, and damages, if any are allowed. The court will, if you so find, afterwards determine the amount of the recovery in each case and render judgment accordingly; the parties, by their counsel, having consented to this form.

The plaintiffs claim that they are entitled to damages, in addition to the value of their property destroyed, on account of vexatious delay caused by the conduct of the defendants. To establish this claim the plaintiff must show that the defendants had not reasonable ground for contesting either the validity or the amount of the claim. If you find from the evidence that there was vexatious delay, within this definition, you may add to the value of the property destroyed not exceeding 10 per centum of the amount of such loss, and include such addition in your verdict. The burden is upon the plaintiffs to prove the fact of vexatious delay by a preponderance of testimony.

If the jury finds for the plaintiffs, then it will add to the amount of loss found interest at 6 per cent. per annum from the fourteenth day of March, 1879, when the demand is shown by the uncontradicted testimony to have been made.

OGDENSBURG & LAKE CHAMPLAIN RAILROAD CO. v. BOSTON &
LOWELL RAILROAD CORPORATION.

(Circuit Court, D. Massachusetts. September 30, 1880.)

CONTRACT—CONSTRUCTION.

In Equity. Demurrer.

Sidney Bartlett and *F. W. Palfrey*, for complainant.

J. G. Abbott, for defendant.

LOWELL, C. J. This bill is brought for an account, and for payment of such proportion of the money lent by the Ogdensburg & Lake Champlain Railroad Company, the complainant, under an agreement set out in the bill, as is due from the Boston & Lowell Railroad Corporation, the defendant.

The agreement is between the Northern Transportation Company of Ohio, of the first part, and Smith and Stark, who are to act as trustees, of the second part; the Vermont Central, Vermont & Canada, Northern, (of New Hampshire,) and Boston & Lowell Railroad Companies, of the third part; and the complainant of the fourth part. It is to be in force for 19 years from March 1, 1871.

The agreement recites that the several companies own most of the line of railroad between Ogdensburg and Boston; that it is very important for them to have a regular line of steamers from western cities and towns to Ogdensburg; that the party of the first part was incorporated to furnish such a line, but is embarrassed, and may be unable to carry out its purpose; that, for securing this end, it is for the interest of the several parties of the third and fourth parts to lend to the parties of the second part a portion of the gross receipts from passengers and freight brought by such steamers. It appears, afterwards, that this object was expected to be attained by investing the sums so paid and advanced, in the debts, stock, and bonds of the party of the first part.

The agreement provides that the parties of the first part will keep and run its steamers for 19 years to the satisfaction

of the parties of the second part. That the parties of the third part will, during said term, semi-annually reserve out of the gross receipts for transportation from said line of steamers the sum of \$150,000, and pay it to the parties of the second part; that the party of the fourth part (the complainant) will, if requested, advance \$600,000 for the same purposes, and to be *pro tanto* in lieu of the said semi-annual payments; that, if this is done, the parties of the third part will pay interest, semi-annually, at the rate of 8 per cent., to the complainant, and will pay into the hands of the presidents and treasurers, for the time being, of the plaintiff and defendant companies, such sums as shall, when invested as a sinking fund, in the judgment of said presidents and treasurers, pay all excess of the complainant's advances above \$500,000, within two years from the date of the agreement, and the remainder at the end of 19 years; and, also, such sums as will, in the judgment of said presidents and treasurers, buy the existing mortgage bonds of the transportation company, within 10 years from said date. The said payments to the complainant, and to the trustees of the sinking fund, are to be in place of advances to the same amount as before provided, and are to be ultimately repaid out of the securities purchased by the parties of the second part. The fifth article concludes thus: "In no case shall payments to a sinking fund be less than amounts which, invested at 6 per cent. per annum, will produce the sum to be paid out of such sinking fund."

The agreement provides carefully, in article 7, how the parties of the second part shall carry out their trust. They are to procure, if possible, an extension of the time of payment of the mortgage bonds of the party of the first part; they may, if necessary to secure the running of the steamers, buy the debts of that company, whether secured by mortgage or not, and shall immediately transfer them to the trustees of the sinking fund, to be held in trust to pay, first, the sums advanced by the complainant, and next the sums paid, advanced, or lent by the parties of the third part, so long as the semi-annual payments of interest are made to the com-

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plainant, and of sums for the sinking fund to the trustees thereof; but, if default is made in these payments, the trustees of the sinking fund shall, if requested in writing by the complainant, proceed to collect said debts, (that is, the debts of the transportation company,) and, out of the sums collected, pay the semi-annual interest, and hold the balance, if any, as part of the sinking fund; "and that all of said sinking fund shall finally, at the end of said term, be applied to pay all advances of the party of the fourth part; and, if any balance shall remain, the same shall be divided among the parties of the third part, in such proportion as they shall be entitled to; and, if said sinking fund shall prove insufficient, the parties of the third part shall make up the deficiency out of the gross receipts from said business, brought by steamers, as aforesaid."

The bill alleges that when the agreement was made the complainant's road, equipments, and appurtenances had been leased and demised to the Vermont & Canada and Vermont Central Railroads for 20 years, from March 1, 1870; that the complainant paid \$600,000 to the parties of the second part, in accordance with the agreement; that the presidents and treasurers of the plaintiff and defendant corporations did fix and determine the amount to be paid semi-annually to the sinking fund; that the parties of the third part did, severally, thereafter pay the amount so fixed, in proportion to their respective shares of the gross earnings, until September 1, 1874, and have made no payments since that time, and that there remains due the complainant \$392,000; that in January, 1875, proceedings were taken, by persons not parties to the agreement, against the Northern Transportation Company, and in February, 1876, their steam-boats and other property were all sold by order of court, and were no longer continued in said service of transportation; that the defendant company is bound to pay to the complainant such proportion of the sum remaining due them for advances as aforesaid, as the amount of gross earnings of the defendant from the said business bears to the total gross earnings of the parties of the third part. The bill alleges that this share is

not less than one-fourth, and asks for an account by which the precise proportion may be ascertained, and for payment of the amount found to be due, and other relief. The case was argued upon the bill and the defendant's demurrer. The theory of the bill is that the companies composing the party of the third part are absolutely bound to pay the complainant the sums advanced. The demurrer assumes that the payments are to be made only out of gross receipts from the Ogdensburg business.

Upon the most careful reading of the contract, we are of opinion that the parties of the third part have not bound themselves to pay this advance at all events. It may be difficult to see why the complainant should have made such a contract; but we must take it as it is. It seems to us that the parties of the third part were willing to rely upon the security which would be furnished by buying up the bonds, stock, and debts of the transportation company, and that the complainant trusted to that and the pledge of the gross earnings of the business. The agreement for securing the complainant seems to us to be summed up in the concluding part of article 7, that "if said sinking fund shall prove insufficient, the parties of the third part shall make up the deficiency out of gross receipts from said business, brought by steamers as aforesaid."

Upon this construction of the contract it becomes necessary that the bill should allege that there were gross receipts up to the time when the business was stopped, beyond what was paid to the sinking fund. Besides this, the bill should either make the trustees, Smith and Stark, and the trustees of the sinking fund, parties, or allege (what we suppose is the truth) that they have nothing of value in their hands applicable to the payment of the complainant's advances.

If the other railroad companies, who, with the defendant, are parties of the third part, were citizens of this district, or found therein, it would be proper that they should be parties, in order that the total account of gross receipts should be taken in one suit. If they are not within the jurisdiction the suit will not be defeated, because the undertaking of each

party of the third part is several; the clause at the end of article 7 means that each company shall make up its part of the deficiency to the extent of its share of the gross receipts; and therefore it is a matter of convenience, and not of necessity, that all these parties should be joined.

On demurrer it does not appear that the corporations, whose homes are out of this state, could have been found within it.

The suit is not premature, because the contract has been abandoned through necessity, and the plaintiff is not bound to wait for the defendant to resume payments to a sinking fund which no longer exists, and which the defendant denies that it is bound to make.

We are of opinion that the whole gross receipts from the business mentioned in the contract, which accrued to the defendant during the time that the steamboats continued to run, are pledged to the complainant; but that no payment can be demanded of the defendant beyond the amount of these receipts, and that the bill must be amended before an account of these receipts can be ordered.

Demurrer sustained.

In re WELLS, Bankrupt.

(District Court, W. D. Pennsylvania. October 15, 1880.)

1. W., a glass manufacturer, filed a petition in bankruptcy, but before adjudication made a composition agreeing to pay 50 per centum of his debts in instalments, evidenced by his promissory notes, the first payable in six months. He resumed his business, and employed P. as an operative. Failing to pay the first instalment of his composition it was set aside, and he was adjudged a bankrupt. While the composition was in force he sold glass, which was in stock when he filed his petition, and manufactured other glass, part of which was on hand when the composition was set aside, and was taken possession of and converted into money by the assignee. *Held*, that out of the assets in the assignee's hands P. was entitled to be paid his wages, \$19.95, earned while the composition was in force.

In Bankruptcy. *Sur* claim of Thomas Pomeroy.

John M. Kennedy, for assignee.

Thomas C. Lazear, for Pomeroy.

ACHESON, D. J. Thomas Pomeroy claims to be paid in full, out of the estate of the bankrupt, \$19.95, being a balance due him for wages of labor. There are a number of claims in all respects similar; and, as the determination of one will practically dispose of all, the case deserves careful consideration. The facts are as follows:

George W. Wells filed a petition for his adjudication as a bankrupt on February 22, 1878, but, before anything further was done in the case, submitted to his creditors a proposition for a composition, viz.: to pay them 50 per cent. of their claims in instalments, to be evidenced by his promissory notes, the first payable in six months after the recording of the resolution accepting the proposition. The creditors, at a meeting held April 8, 1878, accepted the proposition, and the composition was confirmed by the court on August 3, 1878. Wells was a glass-manufacturer, his assets consisting principally of his glass-works and stock in trade. After his composition was confirmed, he resumed his business as a glass manufacturer, and employed Thomas Pomeroy as an operative. Wells made default in paying the first instalment of his composition, and thereupon, on the petition of himself and the larger part of his creditors, the court set aside the composition, and the proceedings in bankruptcy were resumed by an order in the terms following, to-wit: "Composition set aside and bankruptcy resumed, saving all rights attached meantime."

During the time the composition was in force Wells sold glass which he had in stock when his original petition was filed, and manufactured other glass, some of which was on hand when the composition was set aside; but at that time the stock on hand was less in quantity than when the original petition was filed. The wages of Thomas Pomeroy, in question, were earned at the glass-works while the composition was in force. Wells was adjudged a bankrupt on August 22, 1879. His assignee took possession of, and converted into money, the bankrupt's stock of glass, etc., on hand when the

composition was set aside. Out of the proceeds of the stock Thomas Pomeroy claims to be paid his wages. To the register's report against the allowance of the claim, Pomeroy has filed exceptions. The register makes a very strong, and perhaps unanswerable, argument to show that as the claim did not exist at the time the petition in bankruptcy was filed, it is not provable as an ordinary debt against the estate of the bankrupt. But if this be so, there is only the stronger reason for giving the claim a preference; otherwise a most meritorious claimant will receive nothing out of the bankrupt's estate. The register concedes the hardship of rejecting the claim *in toto*, but he was unable to see any way for the relief of the claimant, especially in view of the decision in *In re Brightman*, 18 B. R. 566. But that case, I think, is readily distinguishable from the present one. There the claim was for the price of goods sold to the bankrupts while they were doing business during the continuance of a composition which was afterwards set aside. These new goods had been disposed of by the bankrupts, and there was nothing to show for them. The vendors, nevertheless, claimed to be paid *out of the bankrupts' original assets*, in full and in preference to the old creditors. The point actually *decided* was that *they were not entitled to such preference*. Judge Lowell, in remarking upon the absence of the elements to constitute an estoppel against the old creditors, said: "*None of the assets were acquired in the new trade.*"

But here the labor of the claimant has gone into the assets of the bankrupt, and this with the implied consent of the general creditors. Shall they, then, keep the fruits of his labor without rendering any equivalent therefor? The creditors voluntarily left the assets in Wells' hands, and it must be presumed that they intended that he should operate his glass-works. Perhaps it would be going too far to say that they held him out as capable of contracting debts generally; but, to the extent of the wages of labor necessary to carry on his business, I think the creditors must be held to have given him a license to contract debts and charge the assets with the payment of such wages.

These wages are somewhat analogous to claims for expenditures incurred in preserving or taking care of the bankrupt's property before it comes into the hands of the assignee; and such expenditures will be allowed by the bankrupt court in the exercise of its equitable jurisdiction. *In re Grant*, 2 Story, 312; *In re Fortune*, 2 B. R. 662.

The saving clause to the order (which was made by the late Judge Ketcham) setting aside the composition, has, I think, some significance: "Composition set aside and bankruptcy resumed, *saving* all rights attached meantime." Now, I am not aware that it has been claimed that any "rights attached" to the bankrupt's assets while the composition was in force other than these labor claims; and, it seems to me, it is not a strained construction of this clause to hold that the deserving claims of Thomas Pomeroy and his fellow workmen are within its scope and intent.

The wages of labor are regarded by the law with especial favor. Hence, in the distribution of the estate of a bankrupt a partial preference is given to such debts by section 5101 of the United States Revised Statutes. The labor claim in question here in amount falls within the limit of the statutory preference; and, if not otherwise covered by the letter of the law, is within its spirit. But it is said that when the composition was set aside there remained of the assets less in quantity than when the original petition was filed. This claimant, however, is not responsible for that result. If Wells disposed of assets and failed to make due application of the proceeds, surely the claimant is not to blame. That was a risk the creditors voluntarily assumed when they left Wells in possession of the property.

And now, to-wit, October 15, 1880, the exceptions to the register's report are sustained, and it is ordered that the assignee pay in full the claim of Thomas Pomeroy for his aforesaid wages.

LEECH, Assignee, etc., v. KAY.

(Circuit Court, D. Kentucky. ———, 1880.)

1. **COSTS — CLERK'S COMMISSIONS.** — The commission of 1 per centum allowed to the clerk for receiving, keeping, and paying out moneys, in pursuance of any statute or order of court, by Rev. St. § 828, cannot be claimed unless the money passes through his hands either actually or constructively.
2. **BANKRUPTCY — COSTS — CLERK'S COMMISSIONS — CASE IN JUDGMENT.** — Where an assignee in bankruptcy sold real estate coming into his hands, and subsequently filed a bill in equity in the circuit court to settle conflicting claims to the property, there is no statute requiring him to pay the proceeds of sale into the registry of the court; and as there was no order of court requiring him in this case to do so, the clerk cannot charge commissions on the fund.

In Equity. Matter of the clerk's costs.

I. R. Puryear, for himself.

I. W. Bloomfield and *Henry Burnett*, for plaintiff.

HAMMOND, D. J., (*sitting by designation.*) This was a bill in equity to settle a controversy between the creditors of different firms, to which the bankrupts belonged, as to the distribution of the assets. It is in the nature of a bill of interpleader by the assignee, though, perhaps, not technically such, to settle questions of title to certain property in his possession, claimed as assets by him, which claim was disputed by creditors demanding the property as assets of a firm not bankrupt. By the decree it was adjudged that the property belonged to the bankrupt firm, and should be distributed equally among all the creditors of that firm. The assignee had, as the proceeds of the sale made by him, the sum of \$9,000, and the clerk insists that it was constructively in the registry of the court; that he is entitled to the commission of 1 per centum allowed him by section 828 of the Revised Statutes, and he has so taxed it in his fee bill.

The assignee excepts to this on the ground that the money belonged to him as assignee, and was never in the registry as a fact, nor could it properly belong there. Undoubtedly, in a proceeding like this, whether one of the parties be an assignee

in bankruptcy or not, or whether he claims the property in dispute in that capacity or not, it is competent for the court to order the money to be paid into the registry, or to appoint a receiver of it as in other equity cases. But neither the final decree nor any interlocutory order has made such disposition of the money. It is insisted by the clerk, however, that it is constructively *in court* because the assignee is distributing it under the orders of the court, or holds it as if paid to him by the court here, and therefore it should be considered as having been paid by him into the registry and returned to him through it. The final decree shows that this is a misapprehension of it. After adjudging *the property*, which was a warehouse, to the assignee, it goes on to say, "to be held and distributed as such, [assets of Sebree & Hobson, the bankrupts,] in bankruptcy, *in and by the district court of the United States*, * * * in the matter of Sebree & Hobson, bankrupts, through the register before whom said case is pending in bankruptcy."

It is therefore being distributed in the district court, and not this court. But, aside from this, the bankrupt law provides that the assignee shall deposit the money *in his own name as assignee* in some bank, and does not contemplate that he shall pay it into the registry. Revised Statutes, 5059. It can never go there, except by some order of court making that disposition of it, as in ordinary cases of litigation, for satisfactory reasons appearing in the suit in which the order is made. In the case of *Ex parte Prescott*, cited by the clerk, there was an order that the marshal deposit the money in bank, subject to the order of the court, and though it was not in the registry, but in the name of the marshal in a bank, Mr. Justice Story held that it was, in legal intendment, deposited in court, and allowed the clerk his fees. 2 Gall. 145; 1 Bright, Dig. 274, and note. And so, in *The Avery*, 2 Gall. 308, the same learned judge held that where it was the duty of the marshal to pay a fund into court, upon a sale *pendente lite*, the clerk was entitled to his commissions, although if the sale had been made on final decree the marshal could himself distribute it. The case *Ex parte Plitt*, 2 Wall. Jr. 453,

decides that the clerk is not entitled to commissions "for receiving, keeping, and paying out money," unless the money has actually passed through his hands, or into the custody of the court, or has been agreed to be so considered.

In re Goodrich, 4 Dill. 230, it was held that the statute implies that the money shall be actually received, kept, and paid out by the clerk, and that, generally at least, even where a fund is ordered to be paid through the clerk, the parties may disregard the order and pay directly, and deprive the clerk of his commissions. And see *Upton v. Tribblecock*, 4 Dill. 232, note. I doubt if I should go so far as was done in *Goodrich's Case*, if it appeared that there was a combination between the parties to make the payments so as to defeat the clerk's commissions. However, this case clearly falls within the rule that the clerk is not entitled to commissions unless the money passes through his hands, either actually or constructively. It was not the duty of the assignee, under any statute or other law, to pay the fund he held into this court, nor was he even ordered to do so. The item of \$90, charged by the clerk, must be, therefore, disallowed.

HOLLY v. VERGENNES MACHINE CO.

(Circuit Court, D. Vermont. October 5, 1880.)

1. RE-ISSUE No. 5,132—FIRST CLAIM.—The first claim of re-issued letters patent No. 5,132, dated November 5, 1872, for a new system of water-works for supplying cities and towns with water, *held valid*.
Holly v. Union City, 14 O. G. 5.
2. PATENT No. 94,747, dated September 14, 1869, for a new safety valve for street water pipes, *held valid*.
3. CLAIMS—CONSTRUCTION—SPECIFICATION.—The specification of a patent may be referred to for the purpose of ascertaining the meaning of the claims.
Bates v. Coe, 15 O. G. 337.
Brooks v. Fiske 15 How. 215.
4. MACHINES—SUBSTANTIAL IDENTITY.—Machines are substantially the same, in the sense of the law of patents, when they perform the same function in substantially the same way to accomplish the same result.

5. SAME—SAME—FORM.—In such case form should not be regarded except where it is of the essence of the invention.
6. INVENTION—COMBINATION—LESSER COMBINATION.—If a patented invention consists of a combination of numerous parts, including in it other new and useful combinations of less of those parts, it would seem that the patentee was entitled to the exclusive use of those lesser combinations, as well as to the exclusive use of the whole.
Sharp v. Tift, 12 O. G. 1282.
Prouty v. Ruggles, 16 Pet. 336, distinguished.
7. PATENTABLE DEVICES—INFRINGEMENT.—Patentable devices cannot be used for the purpose of infringing an existing patent.
8. INFRINGEMENT—COMBINATION—VENDOR.—The sale of a machine to be used for the purpose of infringing a patented combination renders the vendor liable.
Bowker v. Dows, 15 O. G. 510.

In Equity.

Hatch & Stein and *W. L. Burnap*, for orator.

Roberts & Roberts and *L. L. Laurence*, for defendants.

WHEELER, D. J. This suit is brought upon re-issued letters patent No. 5,132, dated November 5, 1872, for a new system of water-works for supplying cities and towns with water, and original letters patent No. 94,747, dated September 14, 1869, for a new safety-valve for street water-pipes, both granted to the plaintiff. The defences are that the plaintiff is not the original and first inventor of the inventions described in the patents, and that the defendants do not infringe. The cause was heard at last term on pleadings, proofs, and arguments of counsel.

Before the plaintiff's invention, water to supply cities and towns was, when the supply was located high enough, drawn into a reservoir and from thence into a main pipe, from which others ramified through all parts of the city or town, and into dwellings and other places, to spigots, from which it could be drawn as wanted for use. In level places, where there was still an elevation for a reservoir, it was forced by pumps into a reservoir; and when there was no such elevation it was forced into a stand-pipe of the necessary size and height, or into mains connecting with such a stand-pipe, and the pressure of the water in the reservoirs or stand-

pipes would regulate the flow to the spigots and hydrants. Where it had to be supplied by pumps the irregularity in the amount drawn at the spigots and hydrants would not admit of a uniform supply to the mains, and if pumps were employed furnishing such a supply the incompressibility of water is such that when the drawing ceased the pipes would burst, or the pumps or machinery be broken.

The plaintiff's inventions obviated these difficulties by providing pumping machinery which increasing pressure of water in the mains would slacken and decreasing pressure would hasten, and guarding against sudden shocks from the quick closing of hydrants by the use of an air chamber connecting with the mains and preventing the danger of continued pressure from that source, while the machinery was slackening by a peculiarly-arranged relief valve, applied to the mains so that the water could be pumped directly into the mains, and drawn therefrom by the spigots and hydrants at pleasure, with safety to the works, without any stand-pipe or reservoir. None of the systems set up as anticipations had these contrivances combined in this manner. The London water-works, constructed by Peter Maurice in 1582, as described by Thomas Ewbank in *Hydraulics and Mechanics*; the system of water-works described in the English patent to Joseph Bramah, dated October 31, 1812; and the London bridge water-works, described by William Mathews in *Hydraulia*, 1835, — had pumps forcing water directly into mains to be carried to inhabitants, but neither of them had any contrivances for slackening the quantity forced as any pressure increased from diminishing the quantity drawn as described; neither does it appear from the descriptions given, but that the water flowed through by a constant flow, and was caught as wanted for use.

Birkinbine's system, at the state lunatic hospital at Harrisburg, Pennsylvania, had connection with a reservoir at the top of the building. Linsley's system, at Burlington, Vermont, had connection with a reservoir above the city. Birkinbine had no means for regulating the quantity pumped by

the severity of the pressure in the mains, and Linsley had none for lessening the quantity as the pressure increased. His system was nearer like the plaintiff's than any other was; but his lacked some of the essential features of the plaintiff's. His had means for slacking the pumping machinery, when the pressure in the mains decreased, to prevent the machinery from running away if the pressure should be removed by bursting or other casualty; but this is quite different from regulating the supply according to the pressure. He had pipes leading each way from the main, carrying the water up to the reservoir, and as to those pipes the water was pumped directly into them without going to the reservoir; but, as they were connected by the main with the reservoir, the pressure in them would be regulated by the pressure from the reservoir, and would not in any manner regulate the quantity pumped according to their requirements. Birkinbine had a safety-valve on the main for the same purposes as the plaintiff's relief valve, but his valve was held by dead-weights, while the plaintiff's is steadied by a dash-pot.

None of these things show that the plaintiff was not the original and first inventor of the inventions described in both patents. This is in accordance with the decision of *Drummond and Gresham, JJ.*, in *Holly v. Union City*, 14 O. G. 5, so far as that decision goes, which only involved the re-issued patent. This suit rests upon the first claim to that patent, which is for "the above-described method of supplying a city with water,—that is to say, by pumping directly into the water mains when the apparatus for that purpose is supplied with contrivances by which the pressure within those mains may be preserved in a great degree uniform, sufficiently so for practical purposes, or increased or diminished at pleasure,—substantially as and for the purpose above shown." It is objected that this claim does not specify any devices constituting the system mentioned, and that it is too indefinite to furnish a foundation for a claim for infringement; but this objection cannot prevail. The patent is to be read all together, for the purpose of ascertaining the meaning of the whole and of every part; consequently the specification may

be referred to for ascertaining the meaning of the claims. *Bates v. Coe*, 15 O. G. 237; *Brooks v. Fiske*, 15 How. 215.

The specification describes pumping apparatus which the increase of pressure in the mains will slacken, and decrease will hasten; it describes mains connected with an air-chamber, and a relief-valve for easing the shock of sudden and continued pressure, and mains from which the water is drawn as wanted, or closed mains, operating by pumping the water directly into the mains without a reservoir or stand-pipe. The claim of the system as and for the purposes above shown is a claim for this combination of these various contrivances, operating together in this manner, for this purpose. It is for these devices so combined and arranged, and not for any abstract principle or method apart from the devices themselves. The claim appears to be valid when so construed. *Holly v. Union City*, 14 O. G. 5. The plaintiff's pumping apparatus is arranged so that the increase of pressure in the mains will lessen the amount of water being pumped into them by forcing the water against a piston, the motion of which, operating through complicated devices, shuts off the motive power and slackens the pumps. This is the pumping apparatus supplied with contrivances by which the pressure within the mains may be preserved, in a great degree, uniform, which is mentioned in this first claim, and that part of the patented invention covered by this claim is the combination of this apparatus with the mains, the air-chamber, the relief-valve, the pipes, and the spigots.

The answer and the evidence show that the defendants have put in water-works for cities and towns, or participated in putting them in, which have the pumping apparatus described in letters patent No. 154,468, dated August 25, 1864, issued to John P. Flanders, one of the defendants, for an improvement in pumps, stated in the specification to relate more particularly to pumping engines adapted to the delivery of large volumes of water, as in town or city supply where no stand-pipe or reservoir is employed, and in the description referring only to such engines as pump directly into the mains. In this pumping apparatus the increasing pressure

of the water in the mains decreases the amount of water pumped in by acting upon a valve which opens and closes a duct leading from one end of the pump cylinder to the other, around past the piston, so that when the pressure opens the valve the water is pumped from one side of the piston to the other, and not forced along; and when the pressure is diminished by the opening of the spigots and drawing water, the valve closes, and the water is forced along again to take the place of that drawn off. This is a pumping apparatus supplied with contrivances by which the pressure within the mains may be preserved, in a great degree, uniform, as mentioned in this claim of this original patent of the plaintiff. The combination and arrangement are the same in the defendant's works as in the plaintiff's, unless there is a substantial difference in these pumping engines, and the rest of the combination is the same whether there is a difference here or not.

Two questions arise here. One is whether these pumping engines are substantially the same in this arrangement; and the other is whether the rest of the arrangement is a part of the plaintiff's patented invention if they are not. If they are, the defendants have taken the whole of the invention covered by this claim. If they are not, and the rest of the combination without them is covered by the patent, then the defendants have taken so much of the patented invention. In this matter of regulating the flow of water in such pipes according to the wants of consumers, without the aid of the force of gravitation furnished by reservoirs and stand-pipes, the plaintiff precedes Flanders, and has produced something which underlies all that Flanders has produced, and, if it includes what Flanders has produced, he has a monopoly of it. *Railway Co. v. Sayles*, 97 U. S. 554. And these pumping machines are substantially the same in the sense of the law of patents, when they perform the same function in substantially the same way to accomplish the same result; and, except where form is of the essence of the invention, it should not be regarded in questions of this kind, and it is not of the essence of this invention. Attention should be paid to such

portions as really do the work, so as not to give undue importance to parts used only as a convenient mode of construction. *Machine Co. v. Murphy*, 97 U. S. 120.

Here the pressure in the mains does the work of lessening the flow. In the plaintiff's machine it does it by pressing against a valve and slackening the machinery propelling the water; in the defendant's machine it does it by pressing against a valve and lessening the effect of the machinery upon the water. The means are the same, the result is the same, and the mode is different only in form. *Foster v. Moore*, 1 Curtis, 279. If this was not so the arrangement of the mains, air-chamber, relief-valve, and pipes was new, and a material part of the invention, which would be covered and included in this claim of the patent, and which the defendants would have no right to take and use in connection with Flanders' invention. *Sellers v. Dickinson*, 6 E. L. & Eq. 544, 5 Exch. 312; *Lister v. Leather*, 8 Ell. & Blackb. 1004. Flanders' pumping apparatus is the equivalent of the plaintiff's, in making up a system of water-works with these other parts, although it may not be the same thing for other purposes. The question now is not whether they are the equivalents of each other for all purposes, but is whether they are for this purpose.

In *Sellers v. Dickinson* the patent was for machinery, consisting, among other things, of a clutch-box, operating automatically, to cut off the power from a loom whenever the shuttle became entangled, combined with other mechanical contrivances through which the momentum of the sley was made to move a brake against the fly-wheel to take up the momentum of the parts and prevent sudden shock from the stoppage. The clutch-box was old, but its combination with the brake was new. The defendants' contrivance for accomplishing the same object, and for which he had obtained a patent, dispensed with the clutch-box, and had different contrivances from the plaintiff's for applying the momentum of the sley to the brake. It was argued that the patent was for a combination, and that there could be no infringement unless the whole combination of the same elements was used. This argument was overruled, *Pollock, C. B.*, saying that if a por-

tion of a patent for a new arrangement of machinery is in itself new and useful, and another person, for the purpose of producing the same effect, uses that portion of the arrangement, and substitutes for the other matters combined with it another mechanical equivalent, that would be infringement, and the plaintiff there had judgment. The defendants here use the pressure in the mains for the same purpose that the plaintiff does, and thereby complete the arrangement of the plaintiff's patent, the same as the defendant there used the momentum of the sley for the same purpose that the plaintiff there did, thereby completing the combination of that patent.

These views do not differ from the decision in *Prouty v. Ruggles*, 16 Pet. 336, and like cases, where it is held that a patent for a combination of several parts to accomplish a result is not infringed by a combination of less of the same parts, alone, or with others substantially different, to produce the same result. That case was put expressly upon the ground that neither any of the parts, nor any portion of the combination less than the whole, was new. The patentee is entitled to the exclusive use of the whole of his patented invention; and if it is of a combination of numerous parts, including in it other new and useful combinations of less of the parts, he seems to be entitled to the exclusive use of these lesser combinations, as well as to the exclusive use of the whole. *Sharp v. Tift*, 12 O. G. 1282. The pumping apparatus of Flanders may be an improvement upon that of the plaintiff, and properly patentable as such, so as to entitle him to the exclusive use of those particular devices; but that would give him no right to use his devices to infringe the plaintiff's patent with, although this fact may be of importance in determining the amount of profits or damages due to such infringement.

The other patent is for a dash-pot combined with a safety-valve upon water pipes subjected to great pressure, to steady the motions of the valve in opening and closing. The dash-pot is an old and well-known contrivance for steadying motion, but it had never been combined with such valves before. The defendants use a dash-pot in the same combination, but they

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claim they do not infringe because their dash-pot is different from the plaintiff's. The plaintiff's is closed at the top and receives water, in which the loose piston works, at the bottom from the main on which it is placed. The defendants' is open at the top and receives water there, and is closed at the bottom. Their operation in steadying motion is alike. The pressure of water in the mains may communicate some motion to the piston in the plaintiff's dash-pot which it cannot do to that of the defendants', but that is not noticed in the patent. The dash-pots each accomplish the same result, by the same means, in substantially the same way. The combination is the same, and the use of theirs by the defendants infringes the patent of the plaintiff. *Machine Co. v. Murphy*, 97 U. S. 120.

It has been urged in argument that the defendants only make and sell the Flanders pump, and that they do not infringe the plaintiff's patents, although their purchasers may have infringed by putting them into systems of water-works. If all they did was to make and sell these pumps merely, probably they would not infringe by that alone. But the answer and proofs go beyond this. Flanders, in his testimony as to what works they have put up, does not limit what they did to making and selling the pumps merely. The effect of the whole clearly is that they participated and concurred in putting in the whole by furnishing the pumps for that purpose, and this is sufficient to make them liable as infringers. *Bowker v. Dows*, 15 O. G. 510.

Let a decree be entered that the first claim of the re-issued patent and the other patent are valid; that the defendants have infringed both; and for an injunction and an account, with costs.

BENEDICT & BURNHAM MANUF'G CO. v. HOLLISTER.

(Circuit Court, D. Connecticut. ———, 1880.)

PATENT—INFRINGEMENT.—Letters patent issued to Edward A. Locke on August 2, 1869, for an improved revenue stamp for barrels, sustained.

Stephen W. Kellogg and John S. Beach, for plaintiff.

Calvin G. Childs, U. S. Dist. Att'y, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the alleged infringement of letters patent for an improved revenue stamp for barrels. The patent was issued to Edward A. Locke on August 2, 1869, and was assigned to the plaintiff on November 10, 1875. Prior to and at the date of the Locke invention the internal revenue stamp which was used by the United States government upon packages of distilled spirits, and which was called the "tax-paid stamp," was constructed of two pieces of paper. Before the stamp was printed the paper of which the body of the stamp was composed was perforated with a round aperture, about one and a half inches in diameter. To the back of the paper was then attached, by paste or mucilage, a piece of tissue paper, completely covering said aperture. The stamp was then printed, the engraving covering both the body of the paper and so much of the tissue paper as appears through the aperture.

One object of Locke was to make a revenue barrel stamp which should be so destroyed by the removal of a part thereof that the stamp could not be subsequently fraudulently used, and that the removed part should also permanently contain and exhibit such identifying marks that the facts that the tax had been paid upon the contents of the barrel to which the stamp had been affixed, and that it had been destroyed, should always appear. The principle of Locke's invention was to construct the stamp so that a part, upon which was impressed identifying marks corresponding with similar marks upon the stub, and which was such a well-known part that its removal would destroy the stamp, could, after the stamp had been detached from the stub and had been affixed to a package,

be removed from the rest of the stamp and from the barrel, and could be preserved by the revenue officer.

The portion of the Locke device which is claimed to have been infringed, was constructed as follows: A piece of thin metal was impressed with letters or figures corresponding with the letters or figures upon the stub of the stamp. This piece, made of any appropriate form, was inserted in an aperture in the face of the stamp, and was retained in its place by a "backing piece" of paper, the two pieces of paper being gummed together for this purpose. This backing piece was prepared with dried gum on its outer face, so that the stamp was ready for instant application to the cask. In the specification the patentee further says: "Instead of making the removable piece out of metal, or of making it in a piece separate from the stamp, it may be made of the same piece of paper of which the stamp is composed by simply having its outline perforated, after the manner of postage stamps, but ungummed at its back, so as readily to be torn away and detached from the stamp."

If the stamp was constructed according to the latter method, it would be a stamp made of one piece of paper, with identifying marks upon a portion of its surface corresponding with similar marks upon the stub; said portion being so constructed that it can easily be detached from the residue of the stamp after the whole stamp has been detached from the stub and has been affixed to the barrel. Although the patentee speaks of a backing piece of paper which retained the metal slip in its place, and was to be gummed so as to adhere to the barrel, he does not mention this backing piece in connection with the stamp when made entirely of paper. Probably the fair construction of the specification is that the stamp is always to be provided with a backing piece. In deciding the case, however, I prefer to assume that the patentee supposed that the dried gum was needed only upon the back of that portion of the stamp which was not to be torn away.

The first claim, and the only one which is said to have been infringed, is for "a stamp, the body of which is made of paper

or other suitable material, and having a removable slip of metal or other material, displaying thereon a serial number or other specific identifying mark corresponding with a similar mark upon the stub, and so attached that the removal of such slip must mutilate or destroy the stamp." The stamps which were sold and used prior to the date of this bill and since the date of said letters patent, by the defendant, as a collector of internal revenue in the state of Connecticut, and which were furnished to him by the commissioner of internal revenue for the purpose of being affixed to packages of distilled spirits to denote the payment of tax thereon, are made as follows: The body of the stamp is composed of a piece of paper of one thickness, upon which is impressed the printed matter of the stamp. A strip of blank paper is attached to the outside edges of the back of the body of the stamp. This strip is about one-third of the length of the body of the stamp, and is of the same width. When the stamp is to be used it is placed upon that part of the head of a barrel which has been previously covered with paste, is secured to the barrel by tacks, is varnished, and cancelled by a stencil plate. When the barrel goes from the distiller or owner to the rectifier, the portion over the blank strip, and which is not attached to the barrel in consequence of the intervention of the strip, is cut out and is preserved by the revenue officer. This portion has upon its face identifying marks corresponding with similar marks upon the stub. It is cut out so that the evidence that the tax upon the contents of the barrel has been paid may be preserved, and so that the stamp may be effectually destroyed and be rendered incapable of subsequent use upon another package. This kind of stamp has been used by the internal revenue bureau since January, 1876, and has been an efficacious preventive of fraud. The stamps previously in use did not accomplish this most important result.

The principal question in the case is that of infringement. The objects of the two devices are the same. Upon a narrow construction of the specification and claim, the plaintiff's stamp is of a single thickness of paper gummed upon the back, except as to the part which is to be torn or cut out.

The defendant's stamp is of a single thickness of paper not gummed upon the back, but with a blank strip protecting the portions to be cut out from the paste upon the barrel. The blank strip was described in the plaintiff's specification. The difference is that in the use of the plaintiff's stamp the adhesive material is applied to the back of the stamp, while in the use of the defendant's stamp the adhesive material is applied to the head of the barrel. The method of construction of the two stamps is substantially the same, even assuming that the "backing piece" was not intended to be used when the entire stamp is composed of one piece of paper.

An attempt was made to attack the Locke patent for want of novelty, but the two antedating patents which were somewhat feebly relied upon by the defendant, viz., the English patent of Edward Wilkins, dated November 13, 1851, and the patent of Albon Man, dated September 3, 1867, refer to devices so manifestly unlike the Locke stamp that further examination is unnecessary.

The utility and patentability of the Locke stamp cannot be controverted, in view of the testimony which was introduced by the defendant respecting the various devices which the government had used, and the great success of the device which was finally adopted.

Let a decree be entered for the plaintiff directing an account and an injunction—the terms of the decree as to injunction to be settled upon hearing.

CLENDININ v. THE STEAM-SHIP ALHAMBRA, etc.

(District Court, E. D. New York. July 23, 1880.)

1. COLLISION—SCHOONER'S LIGHTS.—The side lights of a schooner were so placed that when one stood at the stern of the vessel he could see both the red and the green light at the same time, without moving his head. *Held*, that the schooner was in fault for carrying lights so arranged, when an approaching steamer was thereby misled as to the course she was pursuing, and a collision ensued.

2. SAME — SAME — DUTY OF STEAMER. — In such cases, however, the steamer is not absolved from fault, where the change of lights indicated action on the part of the schooner, not only uncalled for but improbable, and where the starting of the engine of the steamer, after it had once been stopped, was the immediate cause of the disaster.

W. W. Goodrich, for libellant.

Butler, Stillman & Hubbard, for respondent.

BENEDICT, D. J. The collision that gave rise to this action occurred in the night-time, on the high seas, between the schooner *Owen P. Hines* and the steam-ship *Alhambra*. The schooner was sailing free, at the speed of about five knots an hour, upon a north-north-east course. The steamer was steaming at the speed of from seven to eight knots an hour, upon a south-west course. Both vessels had green and red lights set. The vessels were upon crossing courses, with the green light of the schooner displayed towards the steam-ship as she approached the schooner from the leeward.

It is proved by those on board the steamer that the schooner's green light was seen by them at a considerable distance off, but heaving so as render it unsafe for the steamer to attempt to cross the schooner's bows, wherefore the steamer's engine was stopped. Afterwards it was started again at half speed, when shortly the vessels came in collision, the port bow of the steamer and the starboard bow of the schooner coming in contact. After the collision the steamer passed on without having spoken the schooner, and soon the schooner sunk, her crew being saved by taking to the boat.

These facts, which are undisputed, would leave the case a clear one for the libellant were it not that the steamer produces the positive testimony of her master, wheelsman, look out, and a man on deck, that after the green light of the schooner was seen the light disappeared, and the red light of the schooner became visible, which gave rise to the supposition that the schooner was undertaking to avoid the steamer by bearing away, and led the steamer to resume her voyage. From the schooner there is the testimony, equally positive, of three witnesses—all who were on deck—that no change

whatever was made of the schooner's course until at the instant of striking, when, as all agree, she luffed.

This testimony from the respective vessels in regard to the course of the schooner, and the lights she displayed, apparently so contradicting, can, I think, be reconciled by reference to the fact, stated by the master of the schooner in the most positive manner, that the side lights of the schooner were placed so that when he stood at the stem he could see both the red and green light at the same time without moving his head.

This fact shows that it may have been possible for those on the steamer to see the schooner's red light, as they say they did, while the schooner's course was held unchanged, as those on the schooner say was the case. In this way, as I am inclined to think, an explanation is offered of the testimony, and statements otherwise wholly irreconcilable are harmonized. But this explanation convicts the schooner of fault for carrying lights so arranged as to mislead an approaching vessel in regard to the course she was pursuing. This fault on the part of the schooner does not, however, in my opinion, absolve the steamer from fault. The steamer saw the schooner displaying a green light, and so near that, according to the testimony of the master of the steamer, it was not safe to attempt to cross the schooner's bows, accordingly the engine of the steamer was immediately stopped. But afterwards, and according to the master, as soon as he was satisfied that he saw a red light, the steamer was started again at half speed.

This act of starting the engine of the steamer after it had once been stopped was the immediate cause of the disaster, for the method in which the two vessels came together indicates that the schooner would have passed ahead of the steamship, although close at hand, if the steamship's engines had not been started. To start the engine under such circumstances was a fault. Assuming it to be true that the green light of the schooner disappeared and her red light became visible, as the master of the steamer states, such a change of

the lights under the circumstances called for the utmost circumspection. It indicated action on the part of the schooner not only uncalled for but improbable, and it should have aroused suspicion in regard to the movements of that vessel, and caused the master of the steamer, having stopped his vessel, to hold her where she was until the location and movements of the schooner were placed beyond all doubt. According to the master the red light showed him that the schooner would pass him safely on his port hand without any action on his part; and he started his vessel again, not for the purpose of avoiding the schooner, but because he had been led into the belief that the schooner, by bearing away, had avoided him, and was then upon a course that would carry her safely by on his port hand.

I think that the circumstances hardly justify the master of the steamer in coming to that conclusion so soon as he did. An instant more of delay would have shown him that he had been misled into supposing that the schooner had borne away; and, in the exercise of the great caution demanded by the circumstances, when once he had stopped his steamer he should have delayed starting her again until the schooner had in fact passed him.

Upon these grounds I hold the collision in question to have been occasioned by fault on both sides, and accordingly must apportion the damages between them.

THE HOPE AND THE FREDDIE L. PORTER.

(*District Court, D. Maine.* September 27, 1880.)

1. COLLISION—STATEMENTS OF CREW.—Courts of admiralty are generally inclined to accept the statements of a crew, as to the movements of their own ship, rather than those coming from those on board another vessel.

The Empire State, 1 Ben. 19.

2. SAME—CONFLICT OF TESTIMONY.—In cases of collision, where there is a great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case.

3. **SAME—VESSEL IN SINKING CONDITION.**—That a vessel was in a sinking condition, and soon afterwards went down, being heavily loaded with stone, may well be inferred from the fact that there is no evidence of her having been seen by any one since the night of the collision, although the place of the disaster was one where vessels were constantly passing.
4. **SAME—VESSEL IN DESPERATE CONDITION.**—Where a vessel injured by a collision is abandoned by her crew and afterwards lost, it is enough to prove that her condition at the time appeared to be desperate.
5. **SAME—CONVERSATIONS WITH CREW—EVIDENCE.**—Conversations with the crew of the lost vessel, subsequent to the collision, are entitled to little weight as testimony in determining disputed questions of fact appertaining to the navigation of the respective vessels.

The Empire State, 1 Ben. 19.

Washington Gilbert, for libellants. *Webb & Haskell*, for claimants.

Fox, D. J. This collision took place about half past nine on the evening of the fourteenth of July last, about three miles south-east of Thatcher's island. The Freddie L. Porter is a three-masted schooner of 349 tons, and was light, bound from Boston into the Kennebec river for a cargo of ice. The Hope is a flat-bottomed, center-board sloop, 42 tons, was loaded with stone, and bound from Cape Cod to Boston. Upon some matters there is more than the usual conflict of testimony between the crews of the respective vessels, and the court has found great difficulty in arriving at a satisfactory conclusion upon the questions thus in controversy. Three of the crew of the Hope are Swedes, one is a Russian, but they all understand our language, and were present in court as witnesses. All of the witnesses in behalf of the Freddie L. Porter are Americans. The witnesses on both sides appeared to be of more than the ordinary intelligence of persons in their position, and all but the mate of the schooner gave their testimony frankly, and without any apparent bias or prejudice, and the court discovered nothing in the appearance or behavior of the other witnesses on either side which should cause any distrust of their statements.

There are some matters upon which both parties agree, and these afford considerable assistance to the court in disposing of the cause. It is admitted by both sides that it was a clear,

moonlight night; that there was but very little sea; that there was about a three-knot breeze, the wind being S. W. by S. or S. S. W., and that each vessel had in place the lights required by law. It is also conceded that the schooner was running free, wing and wing, and that at the time of collision the sloop was close-hauled on her starboard tack. Upon such a state of facts, unless the sloop had shortly before that changed her course, there can be no question if a collision occurred that the schooner would be in fault, and it is therefore claimed in the schooner's behalf that just before the collision the sloop did change her course from the port to the starboard tack, and thereby run across the schooner's bow and caused the collision. The mate and two men were on the schooner's deck, the mate, as he says, being on the lookout, he not being willing to leave that duty to the seamen, as they had joined the vessel that day and he had had no experience of their capacity. The testimony of the mate is that when he first discovered the sloop she was ahead, from an eighth to a sixteenth of a mile off; that he saw both of her lights, and that she was then on her port tack, heading W. by N., the schooner heading N. E. by N.; that he ordered the schooner's wheel hard a-port, which was done, and he then saw the sloop's port light three points on their port bow. The wheel was then righted and the schooner put on her course, about E. N. E. Between the time he first saw the lights and the time he shut in the green light he may have gone one or two hundred yards. That he then ran aft to slack the boom tackle and let the mainsail over, but when he had gone 30 or 40 feet he turned round, and saw the sloop had tacked. Saw her green light. Gave orders to port the wheel again, which order was complied with. They were then going about a knot and a half. That he looked over the schooner's bow but saw no one on the sloop's deck, and heard no hail from her. The two seamen who were in the mate's watch have not been examined as witnesses, as they deserted the schooner on the next day after her arrival.

The testimony of the mate of the schooner is that when he first discovered the sloop he saw both of her lights, and she

was on her port tack, on a course from which no danger could arise, and that she held this course up to the time he left the lookout to run aft; that after going only 30 or 40 feet, and before reaching the boom tackle, he turned and looked forward, and found that in this short space of time the sloop had come about on the other tack so that her green light was visible.

Some testimony has been offered, from parties quite competent to give an opinion, that it was possible for this sloop, under the circumstances, to have completed her tack in this short time; but this is denied by other witnesses equally qualified, and the doubt which was entertained and expressed at the hearing upon this point has not been entirely removed from the mind of the court. The mate (page 73) says: "The sloop was ahead of us; when we first saw her she was standing W. by N., as he judged, from one-eighth to one-sixteenth mile distant, schooner heading N. E. by N. I then saw both lights of the sloop. Schooner's course was changed to E. N. E., when we shut in the sloop's green light." This statement, in the opinion of the court, is incredible, as it is admitted the sloop's lights were in conformity to act of congress. The sloop being ahead, one-eighth, to one-sixteenth of a mile distant, the starboard or green light of the sloop would not be visible on board the schooner, as all of the forward part of the sloop, with the in-board screen, would intervene between the green light and the schooner. The answer does not sustain this statement of the mate, as the allegation there found is "that the mate discovered the red light of the vessel crossing the schooner's bows." No suggestion is made that both lights of the sloop were ever seen at the same time from the schooner.

There were two men on the deck of the Hope, their watch beginning at 8 o'clock. One of them kept the wheel from 8 to 9, the other being on the lookout. At 9 they changed positions. The man at the wheel testifies that he tacked a few minutes after 9. Before that they were on the port tack, and afterwards continued on the starboard tack until the time of collision; that he saw the time by the clock, which was along-

side of the binnacle; that he saw the schooner when he was on the watch, and also after he took the wheel; that the sloop was close-hauled; the schooner was coming right towards us; that he twice made outcries, and the man on the lookout also hailed the schooner, but they got no reply; that when he made the last tack they were about a couple of miles to the leeward of the schooner; that the schooner struck them with her cutwater, breaking in two deck plank and two on her side. The schooner's jib-boom went through the mainsail of the sloop, and her stern was pressed down under water, so that witness was knocked overboard and the water rushed into the cabin and hold. On cross-examination he stated that he took the wheel at just 9, and had been there but a few minutes when he tacked; that he made but one tack while at the wheel, and had been there about half an hour when the collision occurred. Sunman, the other seaman who was on the sloop's deck, says that they had been on the starboard tack 25 or 30 minutes before the collision, and that he was on the lookout all the time. There are two other witnesses from the sloop who testify that they were called on deck by the hail from their vessel, and that when they came on deck the schooner was quite near and the collision was in a very short time.

The statement of the mate of the schooner that the sloop thus tacked just before the collision, and was thereby the guilty party, is thus directly contradicted by the two men who were at the time on the sloop's deck, and who swear that they tacked 25 minutes before the collision. These two men certainly had the best opportunity to know the truth of this matter, and courts of admiralty are generally inclined to accept the statements of a crew as to the movements of their own ship rather than those coming from those on board the other vessel. *The Empire State*, 1 Ben. —. The probabilities are much in favor of the sloop. It would hardly be expected that when the vessels were so near that a change of course would expose them to danger, that those in charge of the sloop, who are experienced seamen, would thus willingly expose themselves to so great risk. The mate's statement as to

the change of course by the sloop is of a suspicious character, and, as before intimated, the court is not quite satisfied that the change could have been accomplished while the mate was running a distance not exceeding 50 feet. I believe, however, that the mate testifies truly when he admits that he saw the sloop on her port tack, but I fear that he designedly misrepresents the time when it occurred. He went on the lookout at 8 o'clock, probably saw the Hope shortly after, and discovered that she was on her port tack. There were other vessels in the vicinity, and I suspect that he neglected to keep a watch of the sloop and failed to mark her course, and did not notice the time when she tacked. Through his neglect the vessels came in contact, and in excuse of his negligence he is quite ready to insist that the change of course was made by the sloop shortly before the collision, rather than a half hour previously, as those on board the sloop state it to have been.

It thus becomes a question of time, merely, how long before the collision the sloop changed from port to starboard; her crew insisting that 25 minutes had elapsed, while the others place it at only four or five. Probably neither party is exactly accurate; but the mate, as I think, by his statement has much reduced the time which elapsed, and I therefore hold that when the sloop went about on the starboard tack the vessels were so far apart that, with proper diligence and attention by those in charge of the schooner, and a compliance by them with the rules of navigation as prescribed by congress, this collision would not have taken place. The schooner was in fault, and is to be held chargeable for the disaster. The question still remains as to the extent of the damages sustained by the sloop. Upon this there is a much greater diversity of testimony than is found as to the cause of the collision. The court, therefore, must adopt the rule laid down in the case of the *Great Republic*, 23 Wall. 20, "that in cases of collision, where there is a great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case." In the present case the claimants insist that but little damage beyond tearing her mainsail was done to the sloop; that before the vessels came in contact

her crew, from cowardice, abandoned her to her fate,—all but one climbing on board the schooner by her bob-stays, and that he escaped in the boat and rowed up in her along-side the schooner, and thus came on board,—and that they refused to return to her after the vessels were separated; that the sloop was not leaking badly, as the crew well knew; that the cook of the schooner, having gone on board the sloop to lower her sails afterwards, went all round her deck and into the cabin, and found no water in her; and that two of the crew of the sloop went to her in their boat to take off the cook, and one of them went down into the cabin at the time and brought away a large amount of clothing; and the master of the schooner states that when the crew of the sloop left his vessel in their boat they rowed off in the direction of Thatcher's island and away from the sloop, and that afterwards, for more than an hour, the sloop's masts were seen by those on board the schooner.

The crew of the sloop all testify that they were on her deck when she was struck by the schooner; that she was pressed down so that the water came up on deck as high as their armpits, pouring into the cabin and hold; that her planks were crushed in, and the water poured into her in a large stream; and that the three only abandoned her and went on board the schooner when they found the sloop in a sinking condition; that they took with them at that time all the clothing that was saved; and that when they went in the boat to the sloop to bring off the cook of the schooner neither of the men left the boat, and no clothing was taken at that time from the sloop's cabin; and, finally, that when they all left the schooner in their boat they rowed near the sloop, saw that her deck was under water, and remained near her for about 20 minutes, when she sank, and this is sworn to have been her fate by all four of her crew. While these conflicts are so great that it is impossible to reconcile the statements, there are other facts which go far to establish the claim that the sloop was so greatly injured that she became a total loss. The schooner was more than eight times as large as the

sloop, and was sailing somewhat faster. She was high out of water, while the sloop's deck was nearly on a level with it.

The chain bobstay of the schooner was parted at the time near the cut-water, and her topmast was broken, so that it came down with the topsail. So great damage could not have been sustained unless these vessels had come together with considerable violence, and it is unreasonable to suppose that the schooner was the only sufferer. It is much more likely that this small, low craft was crushed down by the larger vessel, and that her weight, when thrown upon the sloop, must have forced her under water, and broken in her deck and sides, as stated by her crew, causing her to leak badly. It is possible that the leak might have been stopped, so that she could have been taken into Rockport; but the wind was in an opposite direction, her mainsail was useless, and, if she had run before the wind, she must have gone to sea, instead of making a harbor. That she was in a sinking condition, and soon afterwards went down, being heavily loaded with stone, may well be inferred from the fact there is no evidence of her having been seen by any one since that night, although the place of the disaster was one where vessels are constantly passing.

In *The Rebecca*, 1 B. & H. 347, Judge Betts held "that where a vessel injured by a collision is abandoned by her crew and afterwards lost, it is enough to prove that her condition at the time appeared to be desperate." Applying this rule to the present case, the libellants have established their right to recover the value of their vessel. "In coming to this conclusion I have attached little or no importance to the great mass of testimony introduced into this case relating to conversations with the crew of the sloop after the accident. This description of testimony, although often found in actions for collision, has in most cases been held by the court to be entitled to little weight in determining disputed questions of fact appertaining to the navigation of the respective vessels." *The Empire State*, 1 Ben. 19.

Decree for libellants. Albert Maswick appointed assessor.

C. A. STEVENS and others v. THE RAILROADS.

(Circuit Court, W. D. Tennessee. September 18, 1880.)

1. **CHANCERY PRACTICE—DISMISSAL BY THE PLAINTIFF WITHOUT PREJUDICE.**—The plaintiff will not be allowed to voluntarily dismiss his bill "without prejudice to the bringing of another suit," unless the circumstances are such that the court would, upon final hearing, permit the bill to be so dismissed.
2. **SAME—SAME—EXCEPTIONS TO THE GENERAL RULE.**—The right of a plaintiff to dismiss his bill upon payment of the costs, at any time before a hearing on the merits, is not an absolute and unqualified right. It will not be allowed when, by so doing, the plaintiff will prejudice the defendant; but this injury must be of a character different from the mere ordinary inconveniences of double litigation, which, in the view of the law, are compensated by costs, and must deprive the defendant of some substantive right not available in a second suit, or that may be endangered by the dismissal.
3. **SAME—SAME—CASE IN JUDGMENT.**—This exception is not confined to rights acquired by some order or decree entered in the case. It may arise out of any proceeding in it, and may be based on the nature of the defence, the condition of the pleadings, the agreement of the parties, or any circumstance appearing in the record which shows that it would be inequitable to allow the dismissal. Thus, where the defendant pleaded an estoppel, which, if established, would amount to a defeasance of a lien claimed by the plaintiff on his property, and which it was the object of the bill to enforce, and it appearing that this defence could be endangered by a transfer of the lien after dismissal, the plaintiffs were not allowed to dismiss.
4. **NEGOTIABLE BONDS—LIS PENDENS.**—The exception in favor of negotiable paper to the ordinary rule of *lis pendens*, has no application to a suit commenced to enforce a collateral lien created by third persons upon property not belonging to the debtor, and now in the hands of strangers to the obligation of the bonds. The controversies about the lien are independent of and collateral to those controversies about the negotiable securities which are included in the exception.

In Equity.

L. & E. Lehman, for plaintiffs.

Wright, Folkes & Wright, James Fentress, and E. C. Wae-thall, for defendants.

HAMMOND, D. J. These causes were called for trial at the regular call of the docket, and set for hearing, by consent of parties, for September 6, 1880. On that day the plaintiffs moved to dismiss their suits upon payment of the costs, "with-
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out prejudice to the bringing of another suit, at law or in equity, concerning any of the matters involved therein." The defendants resist this motion, and deny that the plaintiffs can dismiss at all, because by the record it appears that they have acquired rights by the defences they set up, as against these plaintiffs, which would be prejudiced by the dismissal. It is needless, in our view of the case, to state the facts relied on by defendants to take the case out of the ordinary rule allowing a plaintiff to dismiss at pleasure, because the plaintiffs do not ask to dismiss generally, but only without prejudice. It may be stated, however, that it is not claimed that any decree has been made which prevents a dismissal, but only that by the pleadings and the record it appears that certain defences have been made and peculiar circumstances exist which make it inequitable to allow a dismissal without a hearing on the merits, so that their rights may be declared and protected by proper decrees, both against the plaintiffs and as between the defendants themselves.

The general proposition is laid down in the books that the plaintiff may move to dismiss his own bill, with costs, as a matter of course, at any time before decree. The ordinary form of the decree is that, "upon motion of the plaintiff he has leave to dismiss his bill upon payment of the costs," or that "upon payment of costs to be taxed the bill stand dismissed." 2 Hoff. Ch. Pr. Appdx. form No. 117; 1 Id. 328, note. It seems to be a conditional order, and depends upon actual payment of costs to give it effect, unless the defendant chooses to treat the bill as dismissed, and takes steps to enforce it as a judgment for the costs. But what effect will be given to a decree dismissing a bill on plaintiff's motion, when such decree is set up in bar of a subsequent suit for the same cause of action between the same parties, is not well settled. *Babb v. Mackey*, 10 Wis. 314, 371. It is because of this doubt, perhaps, that the plaintiffs here ask the extraordinary order that this voluntary dismissal shall be "without prejudice" to the bringing of another suit at law or equity concerning any of the matters involved herein. The only reason assigned for this form of decree is that, such being the effect of a voluntary dismissal,

it is therefore proper to allow a decree authorizing another suit to be brought.

The learned counsel for plaintiffs produces much authority to establish his right to bring another suit if this be voluntarily dismissed, and asks the court now to determine that question by inserting a judgment on it in his favor in the decree of dismissal. The proper occasion to adjudicate that question will be when the second suit shall be brought, and the decree on the first shall be pleaded in bar to its further prosecution. It is manifestly improper to rule upon it now. If the plaintiffs' assumption of the law be correct, they do not need to add to the decree that it shall be without prejudice to their right to bring another suit; and, unless there be some special circumstance requiring the court to depart from the usual form of decree in such cases, it would not be just to the defendants to prejudge their right to plead a voluntary dismissal in bar of another suit. In *Vaneman v. Fairbrother*, 7 Blackf. (Ind.) 541, the court refused the plaintiff's motion to dismiss "without prejudice," and inserted in the decree that it was dismissed "*with prejudice*." The plaintiff appealed because the order was not granted in the form he asked. The supreme court very sensibly said: "Had the order of dismissal contained the words 'without prejudice,' as desired by complainant, it would have afforded no more security to his rights than it would without them; and the insertion of the words 'with prejudice,' as insisted on by the court, does not render the order of dismissal peremptory, like a decree of dismissal on the merits. Either set of words is unmeaning in an order of dismissal, on the motion of complainant, without a final hearing, as it would have been had the cause been dismissed, on motion of the defendants, for want of prosecution."

After a hearing, either upon demurrer or final hearing, it may be and often is very important to determine whether a dismissal shall be without prejudice; and where the plaintiff has made some slip and finds himself caught in the predicament of having his cause heard imperfectly by reason of some defect of pleading or parties, or misconception of the

form of the proceeding or want of jurisdiction, he may be entitled to such a decree. *Hughes v. U. S.* 4 Wall. 232; *Kendig v. Dean*, 97 U. S. 423; *Clay v. Rufford*, 19 Eng. L. & Eq. 350. We need not go into an examination of this class of cases, and it is sufficient to state that generally, where the plaintiff is without fault and justice would require it, he will be allowed to amend or bring a new suit. It may be that in that class of cases where, if a hearing were had, the court would feel authorized to exercise its discretion and order a dismissal without prejudice, the plaintiff might, on discovering the defect, voluntarily dismiss; and, to save all possible question of his right to bring another suit, the court would possibly allow him to dismiss without prejudice. *Lester v. Leather*, 1 De G. & J. 360-361. In the case now under consideration no suggestion is made of any circumstance like those mentioned to invoke the discretion of the court in favor of such a decree. Motion denied.

SEPTEMBER 20, 1880. The foregoing decision having been announced, the plaintiffs moved to dismiss, in the common form, upon the payment of costs. The defendants insist that this cannot now be done without prejudicing their rights in a way that will make it inequitable to grant this motion. These are bills filed by certain holders of bonds of the state of Tennessee to enforce against the railroads named as defendants a lien which the bills claim exists in their favor on the railroad property now in the hands of the present owners of the roads. Other defendants are persons called in the argument "substitution" bond holders, who own bonds of the railroad companies issued since the bonds of the state that the plaintiffs hold. It appears by the records, and by affidavits filed on the hearing of this motion, that these suits are three of some twenty suits in all filed in this district, and the other federal judicial districts of Tennessee, against all the railroads in the state affected by the alleged lien. The cases have all been prepared for trial in a very elaborate manner, and, being set for hearing, have been all tried, by agreement, except these

three before the court at Nashville, and are now awaiting judgment. Counsel disagreed as to these three, and they were called for trial regularly at the beginning of this term, and passed, for the mutual accommodation of counsel, to enable them to reach some basis of agreement for their trial.

The defendants continuing to urge a hearing, the cases were, by stipulation between the counsel in writing, set for trial on the sixth of September, unless the plaintiffs should show cause for continuance. On that day they moved to dismiss without prejudice, which motion being denied, they now move to dismiss generally. No reason is given for taking this course growing out of any defect in the proceedings or want of preparation for trial, but the motion is urged simply upon the ground of an absolute right to dismiss at pleasure, at any time before the cases are actually heard. The defendants, among other defences, plead an equitable estoppel arising out of the conduct of the plaintiffs. The allegations on this subject briefly are, that the railroad companies, by authority of law, had satisfied the lien now sought to be enforced by the plaintiffs in a settlement they had made with the state before these bills were filed; that in the process of this settlement, and relying on its validity as a release of the lien, they have issued bonds in large amounts, secured by liens on the roads. These are called "substitution" bonds. Both the companies and these "substitution" bond holders allege that the plaintiffs had acquiesced and so conducted themselves in the matter of the settlement with the state, and the issuance of the "substitution" bonds, that they have precluded themselves from claiming any lien for the bonds they hold, however much other persons may be entitled to such a lien.

Letters of the plaintiffs are exhibited, with the answers and proof taken, intended to establish this estoppel on the one hand and to defeat it on the other. The defendants now say, if the plaintiffs voluntarily dismiss these bills they can transfer their bonds to other persons, not affected by this alleged conduct of the plaintiffs, and this defence may be thereby effectually defeated. To this several replies are made: *First*, that the right to dismiss is absolute and un-

qualified; *second*, that the proof does not sustain any estoppel; *third*, that the defendants can, by bill of injunction, protect themselves against any transfer; *fourth*, that the law of *lis pendens* does not apply to negotiable paper, and that a transferee, while this suit is pending, would not be affected by these allegations of estoppel.

On a motion to dismiss I cannot try the merits of this defence, nor determine whether it has been made out by the proof. *Sutton Harbor Co. v. Hitchens*, 15 Eng. L. & Eq. 127. It is sufficient on the present motion that the defence has been pleaded. The point made by defendants is that they are now entitled to a hearing on the question of estoppel, and that, relying on the issue of these suits to determine it, they cannot be defeated of their defence by a voluntary dismissal. It is apparent that if the bonds held by the plaintiffs can be transferred so that the assignee would be unaffected by the pendency of these suits, no injury can result to the defendants by the proposed dismissal. And it is therefore necessary to settle that point.

The rule is established that negotiable paper may be transferred pending a litigation concerning its validity, or in which defences are made to it, and the *bona fide* assignee is not chargeable by the pendency of the suit with the knowledge of the defence. *County of Cass v. Gillett*, 100 U. S. 585, 593; *County of Warren v. Marcy*, 97 U. S. 96; *Orleans v. Platt*, 99 U. S. 676. But this doctrine has no application here. This is not a suit upon the bonds. The obligor, the state of Tennessee, is not a party to the suit, and, even if it were, there is no question about the bonds themselves. Indeed, it is not a suit on the commercial paper. It is an equitable cause of action against third parties. It is a bill to enforce a lien claimed upon property in the hands of the defendants, who are not charged on the bonds in any other sense than that there is a lien upon their property. Some of the defendants setting up the estoppel are alleged to be subsequent lien holders, and as to them the controversy is between the plaintiffs claiming one lien and those defendants another. I do not see how this kind of case can be said to come within the doctrine men-

tioned. It is true the paper said to be secured by this lien is negotiable, and the holder, whoever he be, would be entitled to the benefits of the lien; but the causes of action on the bonds protected by this principle against the consequences of *lis pendens* are independent of and entirely collateral to those causes of action arising out of the lien. If one held a negotiable note, secured by a mortgage given by some third party not bound on the note, it cannot be that all the legal and equitable suits between the payee of the note and the mortgagor would come to naught by a transfer of the note, simply because the note was negotiable, when it is only in a court of equity, and by operation of equitable principles, that a transfer of the note would transfer the lien. The mortgage itself is not negotiable in that sense.

The cases cited neither in principle nor precedent apply to a case like this, and I know of no reason why an assignee of these bonds would not be chargeable with notice, by the pendency of these suits, of the defences set up by defendant, against the claim of a lien on their property. The answer given by Mr. Justice Miller in *Durant v. Iowa County*, 1 Wool. 69, and approved in *Warren County v. Marcy*, *supra*, to objections to the doctrine making negotiable paper an exception to the rule of *lis pendens*, renders this view more certain. He says the party can protect himself against a transfer by injunction, or a decree that the securities be given up to be cancelled. Now no injunction would be granted restraining these plaintiffs from transferring these bonds of the state of Tennessee to whomsoever they pleased, or requiring them to surrender them to be cancelled. The suit does not involve the bonds, and these defendants have no concern with them, or interest in having them enjoined or cancelled. Their only concern is to protect themselves against the claim of a lien on their property, and this they can effectually do only by an adjudication that no such lien exists, and a decree restraining the plaintiffs from setting it up against them. No cross-bill is necessary to entitle a defendant to such a decree. It is the customary decree where a plaintiff sets up in a court of equity a false claim to property, or to an interest in it or lien upon it,

to restrain him from again setting it up. It is done to remove the cloud and keep the title clear. 2 Dan'l, Ch. P. (5th Ed.) 1614, and cases cited, notes 4, 5, and 6.

I have no doubt whatever that these suits do operate as a *lis pendens*, and are no exception to the general rule on that subject. It is argued that every suit operates as a *lis pendens*,—that is, as notice of whatever there is in it,—and, if this fact is to qualify the right to dismiss, no suit could be dismissed by the plaintiff, as he might after dismissal transfer the subject-matter and avoid its effect as notice to the world of the defences pleaded. This would be quite conclusive if it were the *lis pendens* only that is relied upon by defendants; but it is not. The supposed qualification of the right of dismissal depends upon the nature and characteristics of the *estoppel* that is pleaded. That, it is claimed, operates as a waiver by the plaintiffs of any lien, and releases the property, so far as concerns the particular bonds held by them. It is not a merely personal bar on the plaintiffs, but is binding as well on their privies,—certainly those purchasing from them with notice,—and acts as a defeasance of the alleged lien. It is analogous to one purchasing land of another, while the real owner stands silently by, or encourages the purchase. If his conduct does not operate to pass title, it amounts to the same thing, that he and his privies are estopped. Bigelow on Estoppel, 449.

The pleading of that estoppel and its judicial ascertainment are very important to the security of such a title. If these defendants were pleading it by a bill of their own, they would be in no danger of having it circumvented by a transfer of the bonds, and they claim here that they are now entitled to a decree which will give them the same relief as if they had filed a bill; and it seems to me that if they establish the estoppel they would be entitled to such a decree. It is true that the defendants may file a bill of their own, and it is very earnestly argued that this is their only remedy against the supposed danger of a transfer; and it is suggested by the learned counsel that the defendants might bring such a bill in this court, under the provisions of section 8 of the act of

March 3, 1875. 18 U. S. St. 472. I doubt if a bill requiring a personal injunction, and where the injunction is the chief relief sought, could be brought here under that section, and if not the defendants would have to go to the states where the plaintiffs reside. Their argument is that there is no justice in compelling them to this course when the plaintiffs have already brought a suit, and everything is ready for the hearing on the very issues to be made by these proposed injunction suits, and I am of opinion that it is well taken, unless the plaintiffs have an unqualified right of dismissal.

In *Booth v. Leycester*, 1 Keen, 247, 255; S. C. 15 Eng. Ch. R. 247, Lord Langdale, master of the rolls, said that "he had a strong impression at first that a plaintiff might dismiss his own cause upon payment of costs at any time; but, upon inquiring into the practice, he found the rule to be otherwise, and it was certainly quite reasonable that a plaintiff ought not to have the power of dismissing his bill, when by so doing he might prejudice the defendant." Elsewhere it is said, in the report of the case, that it was "the opinion of the most experienced officers of the court that the order was irregular." The cause had stood over to enable his lordship to examine the cases as to the practice, and he stated it as above quoted. There were two suits, *Booth v. Leycester* and *Palmer v. Leycester*, the latter being the one sought to be dismissed. The report is somewhat misleading in calling the second a "cross-bill," because it was not a cross-bill in the first suit, but an independent bill, more properly called in other parts of the report a "cross cause." The two causes had been prepared for hearing, and set down together, when the defendant in the first cause, who was plaintiff in the second, obtained an order, as of course, to dismiss his own bill, and then objected that there was a want of parties in the first. This order of dismissal was set aside as irregular. The ground taken for the dismissal was that Palmer, the plaintiff, had misconstrued a will, under which he claimed in the bill that he was tenant in fee, when he was only a tenant for life. If he was tenant for life, the first suit was defective for want of parties, and this was the advantage he sought by dismissing

his bill, and which the learned master of the rolls would not permit him to take.

I am thus particular in analyzing this cause, because I think the learned counsel for the plaintiff here, and some of the digests are mistaken when they say that it only decides that a defendant will not be allowed to dismiss his cross-bill to the injury of the plaintiff in the original suit. The case was afterwards affirmed "in all its parts" by Lord Chancellor Cottenham, 3 Mylne & Craig, 459, 471; S. C. 14 Eng. Ch. R. 459. This question of practice was not mentioned or referred to on appeal, so far as the report shows, but if the ruling of the master of the rolls had not been correct there was probably such a defect of parties as would have been fatal to the plaintiff's case, and it is fair to infer that if the lord chancellor had not approved the ruling the question would have been noticed. At all events, the decision of the master of the rolls was submitted to, when, if wrong, it might have been reversed. However, the case of *Curtis v. Lloyd*, 4 Mylne & Craig, 194; S. C. 18 Eng. Ch. 193, is relied on as overruling *Booth v. Leycester*, *supra*. The latter case was cited before the same lord chancellor who had affirmed it, and it is said he did not follow it or notice it. It was well said in that case, by the solicitor in favor of the motion to dismiss, that *Booth v. Leycester* was a case of "very peculiar circumstances," and had no application to *Curtis v. Lloyd*. No suggestion was made in this latter case of any injury to the defendant, except that another suit could be brought, and the point made was that it was too late after a cause was set for hearing to dismiss it voluntarily. This point was the only one ruled in the case.

It is conceded by the defendants here that under the practice as settled by that case there is no objection to this motion in respect to the time at which it is made; but they contend that at no time after they have pleaded an estoppel, like that relied on by them, can the plaintiff endanger that defence by a voluntary dismissal, and that this case falls within the exceptions to the general rule. The same thing may be said of *Carrington v. Holly*, 1 Dick. 280. The

only question there was as to the time at which the motion could be made, and there were no special circumstances of injury relied on as an objection to the motion.

In *Badger v. Badger*, 1 Cliff. 237, the second suit had been brought, and the question was whether the first, which had been dismissed, was a bar. The replication to the plea denied that publication had passed, and averred that the bill had been voluntarily dismissed, *no objection being made thereto*; and it may be added that nothing in the case showed any especial injury to the defendant, or other prejudice than the ordinary inconvenience of being vexed with two suits, as to which the payment of costs seems to be regarded as compensation. The learned circuit justice recognizes that the rule allowing a dismissal is not absolute, when he says that the plaintiff might dismiss his bill at any time before a hearing on the merits, upon payment of costs, "unless, perhaps, there had been some order or *proceeding* in the cause conferring rights upon the respondent which would be defeated or impaired by allowing that order." He had no occasion to examine these exceptions to the general rule, and expresses no opinion on the subject.

The case of *Booth v. Leycester* is conclusive against the position that the right protected by this exception must arise out of some order or decree entered in the case. It may arise out of any proceeding in it, and may be found in the nature of the defence, the condition of the pleadings, the agreement of the parties, or any circumstances appearing of record in the case which show that it would be inequitable to allow the dismissal. In regard to the attack made on the authority of *Booth v. Leycester*, both by counsel in *Curtis v. Lloyd* and here, it may be said that when so eminent an equity judge as Lord Langdale says he has examined the practice and corrects an impression before that entertained by himself, as it is now entertained by learned counsel in this case, I must take it to be as he rules, unless he has been put in error by the authorities produced. Matters of practice cannot be decided wholly upon adjudicated cases, and the master of the rolls in 1838 is a far better exponent of what

the practice was at that time than any American judge at this distance from the time fixed for our guidance by the equity rules. Equity Rule 90.

The same lord chancellor, whose ruling in *Curtis v. Lloyd* is so much relied on, said, in *Cooper v. Lewis*, 2 Phil. 177, 181; S. C. 22 Eng. Ch. 181, that "the plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position in which he would have stood if the suit had not been instituted; but that is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff." In that case it was an order on a demurrer, from which the defendant could appeal. Here it is the plea of an estoppel, on which the defendants may have a decree against the plaintiffs personally, in the sense that they need to act upon them by injunction at the hearing; and if now they are allowed to leave the court they may not only rid themselves of the defence by transfer of the bonds, but drive the defendants to other states for redress. By general order No. 117 of 1845, 29 Eng. Ch. R. Prefix 66, the practice was regulated definitely by a rule which is consonant with every sense of justice, and the plaintiff is not allowed to dismiss, or make default, after the cause is set down for hearing, without its being equivalent to a dismissal on the merits. This rule is not binding on us, but it has been adopted in many states, either by rule or statute. *Badger v. Badger*, *supra*; *Howard v. Bugbee*, 25 Ala. 548; *Kean v. Lathrop*, 58 Ga. 355.

The existence of this rule, so soon after *Booth v. Leycester* and *Curtis v. Lloyd*, accounts for the fact that there are no later cases on the subject cited by the text writers. I have consulted all the works of practice, old and new, and all the cases I could find accessible to me, and the general result is that while they say with one accord that it is a matter of course to allow the plaintiff to dismiss at any time before the hearing upon payment of the costs, none of them deny the qualification to the rule; and the cases generally cited anterior to those already mentioned, namely, *Anonymous*, 1 Ves. Jr. 140; *Dixon v. Parks*, Id. 401, 402; *Countess of Plymouth v.*

Bladen, 2 Vern. 31, 32; and *Gilbert v. Hawles*, 1 Ch. Ca. 40, do not any of them fall within the exceptions mentioned by Lord Langdale. In 1 Harrison, Ch. Pr. (Farrand's Ed. A.D. 1807,) 409, the rule is stated thus: "Before appearance, the plaintiff may obtain leave to dismiss his own bill, so after appearance and before answer, or after answer and before the parties have examined witnesses, the plaintiff may generally of course, on motion, have leave to dismiss his own bill, with costs."

The case of *Bossard v. Lester*, 2 McCord Ch. 419, cited by plaintiffs, was overruled in *Bethia v. McKay*, Cheves' Eq. 93; and, in *Bank v. Rose*, 1 Rich. Eq. 292, one of the ablest of our equity courts, by the mouth of a most eminent chancellor, after an elaborate examination of the subject, takes the same view Lord Langdale did, and reaches the same conclusion I have here expressed. It is said in *Butler v. Bulkeley*, 2 Swanst. 396, (373) that "there is no rule of practice in this court which does not yield to special circumstances." Numerous other cases have been cited from the state reports, but I deem it unnecessary to further notice them. None of them deny the qualification, or limit it to rights acquired under a decree.

Other objections are taken, such as that the defendants having answered under oath are entitled to the benefit of the answer as evidence; that by a dismissal the plaintiffs can defeat this right and in a new bill waive the oath, under the amendment of the forty-first rule promulgated December, 1871; that there are rights to be adjudicated as between the defendants themselves; and that these plaintiffs shall not be allowed, by what the defendants' counsel call "arbitrary and whimsical conduct," to deny them a voice in the determination of this important litigation by dismissing the bills against these defendants while prosecuting all the others in the series against the other railroads.

I am inclined to think that none of these objections are tenable to qualify the right to dismiss in the present state of the practice, but it is not necessary to decide these points in the view I take of the first objection considered. The injury

to the defendant must be of a character that deprives him of some substantive rights concerning his defences not available in a second suit, or that may be endangered by the dismissal, and not the mere ordinary inconveniences of double litigation, which, in the eye of the law, would be compensated by costs. Nor is it necessary to consider the suggestion that the stipulation of counsel, and the order upon it, amounts to an agreement to try or continue and not dismiss. I am satisfied that the right to dismiss is not absolute, and that this case is within the qualification mentioned.

Motion denied.

NOTE.—Consult, on the right of the plaintiff to dismiss, Ordinances of Lord Bacon, Nos. 13, 14, 16, 17; Barton's Suit in Equity, (Appendix;) Madd. Ch. Pr. 297; 1 Newl. Ch. 177; 1 Smith's Ch. Pr. (2d Ed.) 312, (Ed. 1842;) Beame's Eq. Costs, 85, 229, (20 Law Lib.); 1 Danl. Ch. Pr. (5th Ed.) 790, and compare previous editions; 1 Hoff. Ch. Pr. 327, and notes; *Handford v. Storie*, 2 Sim. & Stu. 196; S. C. 1 Eng. Ch. 196; *Brandlyn v. Ord*, 1 Atk. 571; *Ruberry v. Morris*, 16 Sim. 313; S. C. 39 Eng. Ch. 313; *White v. Westmeath*, 2 Moll. 128; S. C. 1 Beat. 17; S. C. 12 Cond. Eng. Ch. 478; Gen. Ord. No. 117, 29 Eng. Ch. (Prefix 66;) 2 *De G. Macc & Gord*. 852, note; *Re Orrell Co. L. R.* 12 Ch. Div. 681; *Bierdemann v. Seymour*, 1 Beav. 594; S. C. 17 Eng. Ch. 594, note; 29 Eng. Ch. 350; *Craft v. Johnson*, Tenn. Sup. Ct. Knoxville, 1875; *Ellis v. Smith*, Id.; 1 King's Dig. (2d Ed.) 945, 2; *Foot v. Gibbs*, 1 Gray, 412; *Bigelow v. Winsor* Id. 299, 301; *Borrowdale v. Tuttle*, 5 Allen 377; *Snell v. Dwight*, 121 Mass 348; *Perrine v. Swaim*, 2 J. C. 475; *Burras v. Looker*, 4 Paige, 227; *Cummins v. Bennet*, 8 Paige, 79; *Simpson v. Brewster*, 9 Paige, 245; *Sea Ins. Co. v. Day*, Id. 247; *Saxton v. Stowell*, 11 Paige, 526; *Railroad Co. v. Ward*, 18 Barb. 595; *Wilder v. Boynton*, 63 Barb. 547, 550; *Ogsbury v. La Farge*, 2 N. Y. 113; *Smith v. Adams*, 24 Wend. 585; *Conner v. Drake*, 1 Ohio St. 166; *French v. French*, 8 Ohio, 214; *Louderbach v. Collins*, 4 Ohio St. 251; *Smith v. Smith*, 2 Blackf. (2d Ed.) 232; *Spriggs v. Wilson*, 2 Dev. Eq. 385; *Sayles v. Tibbets*, 5 R. I. 79, 91; *Porter v. Vaughn*, 26 Vt. 624, 626; *Grubbs v. Clayton*, 2 Hayw. 575; *Palmer v. Rankins*, 30 Ark. 771; *Cook v. Walker*, 24 Ga. 331; *Camden, etc., v. Stewart*, 4 Green, Ch. 69; *U. S. v. Keen*, 1 McLean, 429, at p. 447; *Welch v. Mandeville*, 1 Wheat. 233; *Goodyear v. Bishop*, 4 Blatchf. 438.

HODGDON v. BURLEIGH and others.

(Circuit Court, D. Maine. September, 1880.)

1. **TAXATION—UNINHABITED TOWNSHIP—SEVERAL OWNERS—VALUATION—APPORTIONMENT—CONSTITUTION OF MAINE.**—*Quære.* Whether an uninhabited township of land, situated in the state of Maine, and owned in severalty by different proprietors, was rightfully included in a tax act which made no provision for a valuation of the land of the different owners, and no apportionment of the tax, as required by the constitution of the state.
Clarke v. Strickland, 2 Curt. 493.
2. **SAME—DESCRIPTION OF WILD LANDS—USAGE.**—A tax act of the state of Maine located certain wild lands in a specified county, and further described them as "No. 8, R. 3. do. do. do.," the words "do." being placed directly under the entry "W. of E. line of state." *Held*, that such description had acquired a well-known signification from a usage of more than 50 years, and was therefore sufficient.
3. **SAME—PUBLIC AND PRIVATE PROPERTY—FORFEITURE.**—*Quære.* Whether the lands of individual owners are forfeited for the non-payment of a tax, where such lands have been included with those of the state in a valuation and assessment for the purposes of taxation, but have been alone sold for the payment of the entire tax.
4. **SAME—EQUITABLE INTEREST—LEGISLATIVE RESOLVE.**—Under a resolve of the legislature of the state of Maine certain officers and soldiers of the revolutionary war were each entitled to receive a certain amount of land, to be assigned by draft, and were given certificates for the same. *Held*, that the legislative resolve vested in the holders of such certificates an interest in their respective lots, which, at the pleasure of the legislature, could be subjected to taxation.
5. **SAME—UNCONDITIONAL DEED FROM STATE.**—*Held, further*, that subsequent unconditional deeds from the state to the holders of such certificates, did not release said lots from taxes thus imposed.
6. **SAME—FORFEITURE—SUBSEQUENT EXTENSION OF TIME OF PAYMENT.**—Where lands have been forfeited to the state for the non-payment of a tax, and a subsequent act of the legislature has extended the time for the payment of such tax, the title to such lands under a tax sale must be established under the latter act.
Clarke v. Strickland, 2 Curt. 493.
7. **SAME—SALE—NOTICE.**—A tax sale is void unless the notice of sale is duly published in accordance with the requirements of the statute.
8. **SAME—SAME.**—A tax sale is void unless all the taxes under which the sale is made are valid.
Ellwell v. Shaw, 1 Glf. 323.

9. SAME—SAME—CONVEYANCE.—A conveyance of "all the right, title, and interest of the state" in certain lands, by virtue of a forfeiture for the non-payment of taxes, is not authorized by a statute directing a sale and conveyance of such lands.
10. SAME—SAME—IRREGULARITIES—CURATIVE ACT.—Such irregularities cannot be cured by a subsequent act of the legislature, where the former owners still retain their title to the lands.
Slocum v. City of Boston, S. C. Mass. Oct. 1880.
11. SAME—SAME—FEDERAL COURTS—STATE COURTS.—It is the duty of the federal courts to follow the decisions of the state courts on state laws regulating proceedings in cases of tax sales.
Raymond v. Longworth, 14 How. 76, 78.
12. SAME—SAME—CONSTRUCTION.—Proceedings creating a forfeiture and sale of lands for the non-payment of taxes are to be strictly construed.
Tolman v. Hobbs, 68 Me. 316.

Bradbury, Madigan & Webb, for demandant
Albert W. Paine, for tenants.

Fox, D. J. This is a writ of entry for the recovery of township No. 8, in the third range, west from the east line of the state, in the county of Aroostook, containing 23,040 acres. On the first day of the first term the respondents filed a disclaimer of certain specified lots, and pleaded the general issue as to the remainder, which disclaimer was accepted, and the pleadings joined and case submitted to the court for its decision. It is admitted that this township is, and always has been, a wild township, without inhabitants, and not taxable in any city, town, or organized plantation, and that no newspaper was published in Aroostook county prior to December, 1857. March 17, 1835, the legislature of Maine, by its resolve, declared that certain officers and soldiers of the revolutionary war, and widows of deceased officers and soldiers, should be entitled to receive 200 acres of land, to be selected from certain townships, one of which was letter D. The land agent was, by said resolve, directed to cause said townships to be surveyed into convenient lots of 200 acres each, and to execute a conveyance of one lot to each party who should prove his claims, to the satisfaction of the land agent, on or before March 4, 1838.

Before the survey, the parties who should establish their claims were entitled to a certificate, stating they were entitled to receive the 200 acres, which certificate was declared to be conclusive evidence of their right to receive the conveyance, in fee-simple, of one of said lots, whenever the same should be surveyed. By a resolve approved March 18, 1840, township No. 8, the subject-matter of the present suit, was appropriated, in lieu of letter D, to satisfy the holders of certificates for lots issued by the land agent under the former resolves. Where the holders had not selected lots and received their deeds, the land agent was required to have township No. 8 surveyed into lots of 200 acres, and to distribute the same by draft among the holders of such certificates. Commissioned officers and their widows were to receive 600 acres in three lots. Under this resolve the township was surveyed. A plan was made by Thomas Sawyer, Jr., and according to his plan and survey the whole township was divided into 108 lots, of about 200 acres each. Five of these lots were set apart for public uses. These lots are disclaimed by the tenants. All the lots in the township, except those reserved for public uses, were assigned by draft to the holders of the certificates, as provided in the resolves before referred to, and the record of the drawing of the lots was kept by the land agent in his office.

In the years 1841, 1845, and 1850, respectively, the legislature fixed the state valuation by resolves, which are *verbatim* with each other, and of which the following is a copy:

"*Resolved*, That the number of polls and amount of estates annexed to the several towns and plantations in the several counties, and the aggregate of the several counties in the foregoing schedule, be and the same are hereby established as the number of polls and valuation of estates, of taxable polls and estates of this state, until the further order of the legislature."

The schedule referred to in the resolves contained the following entry, which is the only entry claimed to be pertinent to this case, viz.: For 1841:

COUNTY OF AROOSTOOK.

* * * * *

wild lands in the county of Aroostook:

* * * * *

No. and Range.	Acres.	Value.
No. 8, R. 3, west from east line of state.	23,040	\$4,000

The schedule for 1845 was the same, except that the value was \$4,500.

And for 1850 was as follows:

Description.	Acres.	Value.
8, Range 3.	22,040	\$4,500

Demandant also introduced the several acts assessing a tax on the state under said valuations for the several years, from 1841 to 1853, inclusive. The first section of each of said acts, and the only section preceding the schedules, is the same in all, and is as follows:

"Section 1. That each city, town, plantation, or other place hereinafter named, within the state, shall be assessed and pay the several sums with which they respectively stand charged."

In the schedules following the section the following entry is the only one alleged to refer to the matter in controversy. For 1841:

COUNTY OF AROOSTOOK.

* * * * *

D. R. 2 W. of E. line of State.

* * * * *

No. 8, R. 3, do. do. do., (eleven dollars sixty cents,) \$11 60

All the other years are essentially the same, except that the amount of tax varied in different years.

The demandant claims to have acquired a valid title to 93 lots, in this township, by reason of their having been forfeited for non-payment of state taxes, and subsequently deeded by the state to the demandant, or one McCrillis, whose title, it

is admitted, the demandant has acquired. The first deed was executed April 30, 1849, by Samuel Cony, land agent, and is as follows:

"To all persons to whom these presents may come: Samuel Cony, land agent for the state of Maine, sends greeting:

"Whereas, on the twenty-third day of March, A. D. 1849, Moses McDonald, treasurer of the state aforesaid, furnished said land agent with a list of all tracts and townships of land on which the taxes, costs, and interest had not all been paid, and which had by him been advertised, as provided in an act giving further time to redeem the lands forfeited to the state for the non-payment of taxes, and for the disposition of lands which may hereafter become forfeited, approved August 10, 1848, which list includes the tract of land hereinafter described, on which the sum of \$218.37 appeared by said list to be due and unpaid for said taxes, costs, and interest.

"And, whereas, afterwards, on the thirteenth day of April, A. D. 1849, at 11 o'clock in the forenoon, at the land-office of the state, in Augusta, said land agent did sell said premises hereinafter described to William H. McCrillis, of Bangor, in the county of Penobscot and state of Maine, at auction, for the sum of \$300, he being the highest bidder therefor, at that sum, said land agent having first given public notice of said time and place of sale by publishing such notice three weeks successively in the *Age*, being the state paper of said state of Maine:

"Now, know ye that I, Samuel Cony, in my said capacity, in consideration of the premises and of the payment of said sum of \$300, the receipt of which is hereby acknowledged, do hereby sell and convey to him, the said McCrillis, his heirs and assigns, forever, all the right, title, and interest which the state of Maine has, by virtue of such forfeiture, in and to 15,026 acres of land in township No. 8, range 3, west from the east line of the state, in the county of Aroostook; to have and to hold the premises aforesaid, with all the privileges and appurtenances thereof, to him, the said McCrillis, his heirs and assigns, forever: *Provided, however, that the*

owners thereof shall have a right to redeem the same within one year from said time of sale, by paying to said purchaser or assigns the amount for which the same was sold as aforesaid, with interest thereon at the rate of 20 per cent. per annum, and the cost of reconveying the same.

"In witness whereof, I, the said Samuel Cony, in my said capacity, have hereunto set my hand and seal this thirteenth day of April, in the year one thousand eight hundred and forty-nine.

SAMUEL CONY. [L. S.]

"Signed, sealed, and delivered in presence of

"WM. COULTER."

The next deed is from Cony, as land agent, to Hodgdon, is dated April 30, 1850, and is substantially like the former deed, reciting that the list of unpaid taxes was furnished by McDonald, as state treasurer, March 25, 1850; that the premises thereafter described were sold April 30, 1850, at public auction, to Hodgdon; and that due notice was given of the time and place of sale by publishing the same three weeks successively in the state paper. The description of the estate conveyed is as follows: "14,800 acres of land in township No. 8, in the third range, west from the east line of the state, it being the balance of said town returned to me by the treasurer as forfeited for the non-payment of taxes for the year 1845."

The third deed is from A. P. Morrill, land agent, to Hodgdon, dated April 30, 1851, and recites that the list of unpaid taxes for 1846 was furnished by the treasurer to the land agent, March 17, 1851. The sale was made April 30, 1851, and the land agent did thereby sell and convey to said Hodgdon all the right, title, and interest which the state of Maine had, by virtue of the forfeiture, in and to 700 acres of land in township No. 8, range 3.

The last deed was September 27, 1854, and was from the state treasurer to McCrillis, the law having been changed, so that the officer executed the conveyance instead of the land agent. It purported to convey the interest of the state in 4,340 acres in township numbered 8, range 3, the same being forfeited for non-payment of \$29.19, including its proportion

of the state tax for 1849, '50, '51, '52, and '53, and of the county tax for the same years, certified to the treasurer according to law. The deed states that the notices were duly published in the papers according to statute requirements.

In *Clarke v. Strickland*, 2 Curtis, 493, the question was discussed whether an uninhabited township of land, owned in severalty by different proprietors, was rightfully included in a tax act which made no provision for a valuation of the land of the different owners, and no apportionment of the tax, as is required by the constitution of Maine. For satisfactory reasons, there presented, the question was not then passed upon by the court. The same reasons exist in the present cause, and there will be no expression of any opinion upon that question.

The objection is strongly pressed by the tenants that no tax was laid on "township No. 8, in the third range," as it is said all the tax acts describe the estate taxed simply as "No. 8, R. 3," which is unintelligible. This is hardly a correct description of what appears in the tax acts, as, in the first place, the estate is always located in the county of Aroostook; and, secondly, the whole entry is "No. 8, R. 3, do. do. do."—these words "do." being placed directly under the entry "W. of E. line of state," thereby clearly declaring that "No. 8, R. 3," was situated in the county of Aroostook and west of the east line of the state. On reference to the tax acts, as far back as 1821, it will clearly appear that these "cabalistic letters and terms," to use the language of the learned counsel for the tenant, were then employed by the legislature in describing townships to be taxed; as, for instance, in fixing the taxes that year for Washington county, which then included the present county of Aroostook, there will be found the following entry: "County of Washington, No. 1, first range 9, 55-100;" "No. 6, 5, 72-100;" and the same course, it is believed, has been adopted in every tax act since that year. These "signs and cabalistic letters," from a usage of more than 50 years, have acquired a well-known signification, and there is not an individual in this state, who has ever had an interest in an acre of wild land, who, for an instant, could entertain a doubt

that "No. 8, R. 3," in the tax act, was intended to describe a township of that number in that range, and the letters and figures there found would be as intelligible to him, as easily understood by him, as if the entry had been written out at full length instead of being abbreviated.

Another objection to the taxes for every year (excepting three included in the last deed) is that they were laid on the entire township of 23,040 acres, and that, while the full tax was assessed on the 23,040, it was collected only from the owners of the 22,040, thereby exonerating the 1,000 acres of public lands; as, for instance, a tax of \$11.60 assessed on this township in 1841 was laid on 23,040 acres, valued at \$4,000, but the whole \$11.60 was apparently collected from only the 22,040, including the portion sold for the non-payment of taxes.

Property belonging to the state is not ordinarily subject to taxation, but if the state, by its legislature, sees fit to include, in a valuation for the purposes of taxation, its own property, together with that belonging to individuals, and assesses thereon a tax, and afterwards collects the entire tax from the individual owners by a sale of their portion of the estate, as forfeited for the non-payment of the entire tax, it may be questionable whether the individual owner has thereby lost his estate; but, as there are other difficulties which, in the opinion of the court, are fatal to the title of the defendant, it is not necessary for the court to pass upon this objection.

In every year's taxes are included a large number of lots, the fee of which was then in the state, but the equitable interest thereto was in the holders of these certificates. It is claimed that these lots were not subject to taxation, but in the opinion of the court the legislative resolve vested in the holders of the certificates an interest in their respective lots, which, at the pleasure of the legislature, could be subjected to taxation, and this objection, therefore, is not sustained.

By chapter 723, Statutes of 1836, it was made the duty of the state treasurer to cause an assessment of a state tax on any township or tract of land not taxable by the assessors of any town or organized plantation, to be published in the

newspaper of the state printer three weeks successively. County taxes on such township or tract were to be certified by the county treasurer to the state treasurer, who was to credit the county with the amount. The owner of any tract so assessed for state or county tax, advertised as aforesaid by the treasurer, might, at any time within four years (afterwards increased to five) from passing the act of assessment, redeem the same from any state tax by paying the full amount of the tax, with 20 per cent. interest, after one year from date of assessment; and from any county tax, by paying the amount credited by the state treasurer to the county, with like interest, within four years from the date of such credit; and if not so paid it was provided "that said township or tract shall be wholly forfeited, and the title thereto shall vest in the state, free and quit from all claims by any former owner, and the same shall be held and owned by the state, by a title declared to be perfect and indefeasible." This act remained in force until August 1, 1841, when it was repealed by the Revised Statutes.

These provisions were substantially re-enacted by chapter 14 of the Revised Statutes of 1841, but the last publication was to be made by the state treasurer within three months from the day on which the assessment was made by the legislature. Some conflict is found between sections 8 and 9 of this chapter as to the time within which the payment was to be made by the land owner, but the same is of no importance in the decision of this case, as such payments were never made. The title which the state acquired by the forfeiture for the non-payment of the taxes was declared to be perfect and indefeasible, in the identical language used in the former act.

The tax for 1841 was laid under the act of 1836. Those for 1842 to 1846, inclusive, were laid under the Revised Statutes, and it appears that notice of the assessment of the state tax for these various years was each year duly published, in accordance with the requirements of law, with the exception of the year 1842, the notice for which year was inserted in only one week's issue of the state paper. No objection is

raised in argument by the learned counsel for the tenants to the form of the notices thus given. The court does not discover any defect therein, and by the non-payment of the taxes for all these years, excepting 1842, by the owners of said lots, within the time required, after legal notice, the state acquired "a perfect and indefeasible title thereto."

It is claimed by the tenants that, granting the taxes of 1841 and subsequent years were legally assessed, the conveyances subsequently executed by the land agent of various lots to the parties entitled thereto, had the effect to release those lots from the outstanding taxes; that when the state made an unconditional deed of a lot, it thereby released and conveyed all interest therein, and could not afterwards claim a forfeiture of a tax thereon previously assessed. Twenty-seven lots were conveyed prior to 1841, and a like number were conveyed that year; but the deeds were all executed previous to the passage of the act assessing the tax for that year. So that 54 lots were all conveyed to, and the legal title therein was held by, their individual owners when the tax of 1841 was assessed; but in each of these subsequent years, up to and including 1847, one or more lots were deeded by the land agent to the holders of the certificates. The land agent was not authorized by any act to release these lots from the encumbrances they were subjected to for taxes until said taxes had been paid, and, in the opinion of the court, the deeds as executed by him should be construed as passing to the grantees the interest which they were entitled to under the resolves granting these lots to the soldiers, and not as releasing the lots from any burden from which they had become subject for taxes subsequently imposed. To that extent only was the land agent authorized to make a conveyance.

On the tenth day of August, 1848, an act was passed, (chapter 65,) the title of which is "An act giving further time to redeem lands forfeited to the state for non-payment of taxes, and for the disposition of lands which may hereafter become forfeited." This is the act referred to in the first three deeds, under which demandant makes title to the premises, and requires a careful examination of its provisions in

order to determine whether the forfeiture incurred under the former acts was waived by the legislature in behalf of the land owners.

By the first section of this act the treasurer was required to advertise within 30 days, for six months, in six specified papers, a list of the forfeited tracts, specifying the amount of taxes due on each, and the time allowed by the act to pay the same. By the second section the owner could pay the amount at any time previous to the advertisement, or on or before the first day of March of each year after the lands were advertised. Under these sections the time for the payment of the taxes was extended, and a party was not obliged to pay until the advertisement had been published as therein required. Before the treasurer could make to the land agent a return of the list, it was made a condition precedent that such list should have been so advertised; the language in section 3 being "that the treasurer shall furnish the land agent a list of all tracts or townships of lands, which have been advertised as provided in this act, on which the taxes have not all been paid," and the land agent shall, within 60 days, sell the same; that is, those tracts which have been thus duly advertised for non-payment of taxes. The owner might also redeem from the purchaser, within one year after the sale, by paying the amount for which the tract was sold, together with 20 per cent. interest, and was entitled to receive from the treasury any surplus of the purchase money which might there remain after payment of the taxes, etc., if called for within three years.

The question is made that the legislature might waive the forfeitures which had occurred by the non-payment of the taxes, and the inquiry is whether, by this act, it has not so done, and thereby restored to the original owners the right to redeem their estates under the provisions of this act. So that, if the purchaser would acquire a valid title, it must appear that the conditions of the act have been fully complied with.

In passing this act it is most manifest that the purpose of the legislature was to benefit the former owner, to forego any absolute title it might have acquired, and to recog-

nize in him a right of redemption, not only before the sale, but for one year thereafter; and, what is of great significance, if any surplus should remain of the purchase money over and beyond the amount due the state, the same should belong to the land owner. While the state held on to the lands until it was fully indemnified for its claims, it insisted on nothing more—all else was the owners'. Strict forfeiture was waived, both by the state's extension of the time for payment and by acknowledging the right of the owner to any balance which might remain in the treasury. The title of the act may well be referred to, to ascertain the purpose of the legislature. By that it is declared to be "An act giving further time to *redeem* lands forfeited to the state for the non-payment of taxes." Forfeiture and redemption cannot stand together. The moment a right to redeem was allowed, from that instant the forfeiture was at an end.

This extension of the time for the payment of the taxes should have the same legal effect as if it had been by an amendment of former acts, in terms declaring that thereby the time for the payment of the taxes was extended. If the legislature had adopted that course to accomplish its purpose, it could hardly admit of a question (whether the forfeiture had then attached or not) that by such extension of time the state had waived its title, and could acquire no title to the tract until after the time of extension had expired. As soon as chapter 65 took effect, the rights of the owners were restored to them. The legislature acknowledged them as having an interest in the property, as being its owners, subject to the lien of the state for the taxes due thereon, and by the act it provided very different provisions for depriving the owner of his estate on failure to pay the taxes.

If the land still continued the absolute property of the state, there would seem to be no propriety in the former owner having the power to call the state to an account for its disposal of the purchase money. If, on the contrary, the interest of the state was merely a lien for its taxes, then all that the state should require would be payment of its dues, and any surplus should enure to the owner's benefit.

The court, therefore, holds that, under the act of 1848, c. 65, the purchaser did not acquire an absolute title to the lands under previous laws, and, in order to sustain his title, the purchaser must show a compliance with the requirements of this chapter.

In the return made by the treasurer, to the land agent of the tracts advertised by him, he states that "the said tracts or townships had been advertised by him as forfeited lands." It is sufficient to remark that this certificate of the treasurer does not show any compliance by him with the requirements of the act. It may all be true to the very letter, and yet the notice not have been published in a single paper mentioned in the act. A single advertisement, in any paper in the state, would justify this certificate of the treasurer.

The papers introduced in evidence do not prove that notice was given as required. The first notice bears date September 8, 1848, and recites that the several townships and tracts of land mentioned in the following schedule have become forfeited, either in whole or in part, for the non-payment of the amount of taxes specified against each tract or township. The schedule is as follows: "No. 8, R. 3, W. E. L. 102.39."

The number of acres on which the tax remained unpaid is nowhere stated in the notice, but the statement is of a most uncertain character, affording the owners but little information as to the property claimed to be forfeited, the allegation being "that the township, either in whole or in part," had become forfeited for taxes; but whether the whole or a part, and what part, was forfeited, is nowhere averred. The amount of tax stated in the notice as remaining unpaid is also different from that found in the treasurer's return of March 23, 1849, in which he gives the amount of the state and county taxes unpaid for each of the years 1841, '42, '43, '44, amounting, in the aggregate, to \$100.94. In the opinion of the court, this notice was erroneous in both of these particulars: the number of acres of land on which the taxes were unpaid should have been truly stated, and also the amount of taxes remaining unpaid. If these objections are not valid, there is another still remaining, which renders the notice wholly inop-

erative. The advertisement should have been inserted each week for six months in six papers designated by the act; this was not done. In the *Kennebec Journal* there appear to have been but two insertions of the advertisement in each of the months of October, December, January, and February. There is no evidence of the notice having been published in the *Portland Advertiser* after October, and some omissions are found in the publications in the *Eastern Argus*, as well as in the two papers printed in Bangor. Unless the notice required by the statute was duly published in conformity to its requirements, the treasurer had no authority to certify a list of unpaid taxes to the land agent, and he was without authority to sell the same and give a good title to the purchaser.

The treasurer returned to the land agent that the taxes, both state and county, amounting to \$100.94, were unpaid on 15,026 acres of land in this township for the years 1841 to 1844, inclusive, and that officer proceeded to advertise and sell that number of acres, and no more. The ledger of the state treasurer states by whom the taxes were paid for each year, but does not always give the numbers of the lots upon which they were paid. The taxes for the years 1841 and 1842 were frequently paid by the owners in subsequent years, and on referring to the ledger entries for those years it appears for which lots the taxes were thus paid by these parties for previous years. We can thus ascertain for which lots the payments were made during these four years. It appears from the ledger that the taxes for 1841 were paid upon 7,017 acres, in which were twice included lot 61, the tax upon which was paid for that year by both Cotton Lincoln and J. C. Chase, and also lot 60, the tax upon which was also paid by both True Green and J. P. Martin. These two lots, containing 400 acres, were thus duplicated in ascertaining the number of acres upon which the owners had paid the taxes. The 7,017 acres, therefore, should be reduced to this extent, leaving the taxes paid only upon 6,617 acres, and unpaid on 15,423. The state treasurer's return of the number of unpaid acres was, therefore, erroneous. Instead of 15,026 acres to be sold for taxes, there were 15,423, and the

land agent had no authority to sell and convey the smaller number in discharge of the taxes remaining unpaid, thereby leaving over 400 acres exonerated from taxes by the sale of the property of others, in which the owners of the 400 acres are not shown to have been interested.

No law can be found which would authorize such proceedings. The property was held in severalty. Every lot was proportionately encumbered by the tax according to the number of acres it contained, and the 15,423 acres were chargeable with the whole of the unpaid tax; but the result is that the 15,026 acres have thus been made to pay the tax upon the 15,423 acres, and one man's debt has thus been paid compulsorily from another's property, and for which no redress is provided.

The treasurer, in his notice, required of the owners the payment of both state and county taxes, giving the whole amount of the unpaid taxes (\$102.96) without discriminating between them; and in his return to the land agent, after specifying the amount due for each year to both state and county, he aggregates them at \$100.94, and the land was sold for the payment of this amount, with interest and cost. It was conceded the county taxes were illegal for all but one year, the amount assessed having been in excess of that authorized by the legislature, and there is no evidence in support of the county tax for that year, so that none of the county taxes are shown to have been duly assessed; but the treasurer and land agent have always recognized the county taxes as of the same validity as the state taxes, have always claimed them in their advertisements, have demanded their payment from the owners, have finally sold the property on account of their non-payment, and retained their amount from the sale of the property, and the owner could only redeem his estate by payment of the amount for which the estate was sold.

If the state undertakes to sell the property of a citizen for unpaid taxes, all the taxes for which the sale is made must be valid and legal; if not so, no title is acquired by the purchaser. Such was the decision of the supreme court of this

state in 1 Glf. 339, (*Elwell v. Shaw*,) and it has ever since been recognized by the courts.

Most, if not all, of these objections are alike applicable to the first three deeds under which the demandant claims. Fourteen thousand eight hundred acres were returned to the land agent by the state treasurer for unpaid taxes of 1845, and that number was advertised and sold in 1850. Seven thousand two hundred and seven were entered on the treasurer's ledger as paid, but 600 acres are duplicated by the taxes on the same lots having been paid by both Barnes and W. E. Edwards, so that in fact taxes were paid only on 6,607 acres, leaving 15,433 unpaid, while only 14,800 were returned unpaid and sold.

So, for tax of 1846, 21,207 acres appear to have been paid for by the ledger of the treasurer, and only 700 acres were returned forfeited and sold for taxes; in fact, there were 1,433 acres on which taxes for that year were not paid to the treasurer. The title of the demandant, under the deeds of 1850 and 1851, is subject to nearly all the objections which arise as to his title under the deed of 1849, and in the opinion of the court he did not acquire a valid title under either of said conveyances.

By act of 1854 the treasurer was to sell and convey forfeited lands, and by his deed of September 27, 1854, he undertook to convey "all the right, title, and interest of the state in 4,340 acres, by virtue of a forfeiture for non-payment of its proportion of state and county taxes for the years 1849 to 1853, inclusive, in this township." This deed is invalid for various reasons: the sale was for both state and county taxes for each of these years, and there is no evidence of any valid county tax having been assessed; the land was not forfeited, at time of sale, for taxes for 1853, as the owner had a right of redemption for two years after the assessment, and, by the act of 1854, the treasurer could only dispose of lands after forfeiture; the number of acres of forfeited lands was not correctly stated, there being 4,740 acres on which the taxes were unpaid, including the

year 1853, instead of 4,340, the quantity advertised and sold; the land itself was not conveyed, but only the right, title, and interest of the state. For these reasons, in the opinion of the court, the deed of 1854 was invalid.

Some of the objections which have thus been considered have heretofore been presented to this court, and determined in accordance with this opinion. The opinion found in 2 Curtis (*Clarke v. Strickland*, 493) was drawn by Judge Ware, but it was, without doubt, sanctioned and approved by Judge Curtis, as the same was reported by him without comment or dissent. It was then decided that if a tax was legal, and the land forfeited for non-payment, a subsequent act of the legislature, giving further time for payment of the tax, was a waiver of the forfeiture, at least so far that the title under a tax sale must be made under this law. If the county commissioners, in levying a tax, assess a larger sum than is granted by the legislature, it renders the whole tax void. When the treasurer, in his advertisement, gave as the sum due the whole amount, including the county tax, it was a fatal defect in the proceedings,—the county tax, being illegal, was not due. When the land agent was directed by the statute to sell the land, and he sold all the right, title, and interest of the state, such a sale was not in accordance with the statute.

By three of these deeds, "the sale was only of the right, title, and interest of the state." The other deed purports to convey 14,800 acres, but the advertisement only offered for sale "the right, title, and interest of the state in that number of acres," and for this cause all of these conveyances are deemed invalid.

In *Clarke v. Strickland* it was also decided "that if a tax was legal, and the land forfeited for its non-payment, the forfeiture was waived by the levy of another tax after the title of the state had become perfect under the forfeiture." If this principle is correct, it would invalidate the title of the demandant to the larger portion of the township.

The demandant claims that by the act of April 23, 1852, (chapter 172,) these deeds vested in the grantees a valid

title, "notwithstanding any irregularities in the notices, or failures to comply with the provisions of the acts under which the sales were made." Three of the deeds were executed before the passage of this act. Admitting that the state might waive any rights it might have to insist on such irregularities, it cannot be that, by such action on its part, it can divest the title which the owners had at the date of the passage of the act. If these conveyances were invalid, by reason of these defects, and the owners still retained the title to their lands, the legislature could not, by any act it might pass, deprive them of their property. So far as the interests of the owners were involved, the act was null and void.

The supreme court of Massachusetts, in *Slocum v. City of Boston*, October, 1880, Suffolk county, have passed upon an act of the legislature of that state similar to that now under consideration and adjudged it to be unconstitutional. That court had previously decided that certain advertisements of the collector of Boston, of sales of lands for taxes, were not in conformity with the requirements of the statutes. Thereupon, in 1878, the legislature passed an act "that no sale of land for taxes heretofore made should be held invalid by reason of such defect in the advertisements," and the validity of this latter act was the question before the court in *Slocum's Case*. Such legislation did not receive the sanction of that court; by it an owner was not deprived of his estate; the sale was still invalid, notwithstanding the legislature's attempt to remedy the defect; and this decision is an express authority against the validity of chapter 172, so far as the title of the owners of the lots is involved. The last deed was executed subsequent to the passage of the act, but most of the objections which are sustained by the court are alike applicable to all the deeds, and are not dependent on irregularities in the notice, or failures to comply with the provisions of the acts under which the sales were made.

In *Raymond v. Longworth*, 14 How. 76, 78, the supreme court lay down the rule "that it is the duty of the federal courts to follow the decisions of the state courts on state laws regulating proceedings in cases of tax sales."

And the supreme court of Maine, in *Tolman v. Hobbs*, 68 Maine, 316, say: "It is claimed that the land in dispute was forfeited to the state for non-payment of taxes, and then sold by the state to the demandant. The proceedings creating such a forfeiture and sale are to be strictly construed."

In that case the tax title was defeated because it did not appear that the treasurer complied with the law regulating the publication of the list of lands to be sold.

This decision fully sustains the conclusions at which the court has arrived in the present case. By chapter 6 of Revised Statutes, which were in force when the proceedings in that case took place, the land became forfeited to the state if the taxes were not paid within two years of the assessment, and when forfeited the treasurer was required to sell the same, after giving the notices prescribed. Chapter 172 of act of 1852 is found to be substantially re-enacted by section 58, c. 6, Rev. St. By this decision an owner of land, after the alleged forfeiture was incurred, and the land sold by the treasurer, was declared as still having an interest in the estate; that he could stand upon and claim the property, unless the purchaser proved a full compliance with the tax acts, and there was nothing in the act of 1852, or section 58, of c. 6, which debarred him from relying on his former title.

On page 23 of the argument for the demandant it is admitted that he must, in an action like the present, rely on his own title, and in the opinion of the court it is fatally defective in many respects.

Judgment for tenants for all the lots not disclaimed by them, with costs.

ANDERSON, Receiver, etc., v. THE PHILADELPHIA WAREHOUSE
COMPANY.*

(Circuit Court, E. D. Pennsylvania, October 26, 1880.)

1. NATIONAL BANK — INSOLVENCY — LIABILITY OF SHARE-HOLDER — PLEDGEE OF STOCK — TRANSFER TO PRESIDENT OF CORPORATION, PLEDGEE.—A. borrowed money from a warehouse company upon certain stocks as collateral, and it being suggested that the stocks ought not to remain in the name of A. transferred them to the president of the warehouse company. Subsequently A., desiring an additional loan, sent some national bank stock as collateral transferred to the president of the warehouse company. The directors of the warehouse company objected to this transfer on the ground that the company might become liable as share-holders, and, at their request, the president transferred the stock to an irresponsible person in the employ of the warehouse company. The bank became insolvent. *Held*, that the warehouse company were not liable as share-holders unless they had authorized or ratified the transfer to their president as a transfer to them. *Held, further*, that whether they had so authorized or ratified the transfer was a question of fact for the jury.

Motions for new trial, and for judgment, *non obstante verdicto*

This was an action of *assumpsit* brought by the receiver of the First National Bank of Allentown against the Philadelphia Warehouse Company to recover an assessment of \$20, a share upon 450 shares of the stock of said bank, of which, it was alleged, defendant was the holder. The evidence disclosed the following facts: In November, 1871, W. H. Blumer & Co. desired to borrow money from the Philadelphia Warehouse Company upon a deposit of stocks as collateral. One of the firm was introduced by a director of the warehouse company to T. Charlton Henry, its president, and a loan was negotiated upon the security of certain gas stocks. The director suggested that the stocks should be put in some other name than that of W. H. Blumer & Co., and proposed that they be put in the name of the president of the warehouse company, which was accordingly done. About a month later, desiring to effect an additional loan, W. H.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Blumer & Co. sent to the warehouse company a certificate for 450 shares of stock in the First National Bank of Allentown, dated December 27, 1871, in favor of "T. Charlton Henry, Pres." This certificate was received about December 29, 1871. On January 2, 1872, the directors of the warehouse company met, and the president brought before them this loan and certificate. The board objected to the stock being held in the name of the president, because it might render the company liable as share-holders. On January 3, 1872, the secretary wrote to W. H. Blumer & Co. advising them that their draft for \$10,000 had that morning been paid, and inclosing the certificate for the bank stock, with directions to have it transferred to the name of Dennis McCloskey. On January 6, 1872, in explanation of this letter, the president wrote to W. H. Blumer & Co.: "We have no need to borrow any money, nor do we expect or intend to put this stock out of our hands, but the failure of one or two national banks lately led our directors to consider the clause in the national bank act which renders all stock-holders liable in case of failure to pay up to the receiver the full amount of stock in their name, and on this account we determined to have the certificates of national bank stock put in the name of Dennis McCloskey, who is a boy in our office, taking his power of attorney to transfer the same." The transfer to McCloskey was executed on the back of the certificate by the president of the warehouse company, and the seal of the company attached. Sometime afterwards McCloskey left the employ of the warehouse company, and by their direction the stock was transferred to Francis Ferris, who was a clerk in their employ, and at the time of the transfer a minor. The warehouse company continued the loans to W. H. Blumer & Co., and to hold these shares as collateral, until 1878, when the comptroller of the currency, finding the bank insolvent, appointed a receiver, and ordered an assessment of \$20 per share. Neither the warehouse company, McCloskey, nor Ferris ever voted on the stock or received any dividends, but the dividends were receipted for either by W. H. Blumer & Co., or by William Kern, one

of the partners, in whose name the stock had been registered previous to the transfer to Mr. Henry. The plaintiff requested the court to charge the jury as follows: "If the jury find that the corporation defendant held the 450 shares of the capital stock of the First National Bank of Allentown as collateral security for a loan to W. H. Blumer & Co. by transfer to 'T. C. Henry, President,' and then by the defendant to its irresponsible employe, for the purpose of avoiding liability as stockholders, the verdict must be for the plaintiff."

The defendant's first point was as follows: 1. That in order to recover in this case the plaintiff must establish as a fact that the corporation defendant became and was the holder of the 450 shares of the stock of "The First National Bank of Allentown," and that there is no evidence that the defendant was the holder of the said shares, and the verdict must be for the defendant.

The plaintiff's point was affirmed, subject to the judgment of the court thereafter on the defendant's first point, and charged the jury to find for the plaintiff.

The verdict was for the plaintiff for \$10,026. Defendant filed motions for a new trial and for judgment *non obstante veredicto* on the point reserved.

Geo. Junkin and Richard C. McMurtrie, for the motion.

Preston K. Erdman and Edward Harvey, *contra*.

BUTLER, D. J., (*orally*.) The authorities upon the question raised by this case may be divided into three classes: *First*, where the pledgee of stock has taken a transfer of the stock directly to himself, and has had such transfer registered on the books of the corporation. It has been held that in such case the pledgee is liable for assessments. *Second*, where the pledgee has sought to relieve himself by making a transfer of the stock to an irresponsible third person. In such case he is liable. *Third*, where no transfer is made to the pledgee, and his name is not registered as owner, but the owner of the stock puts it into the hands of a third person to hold for the benefit of the pledgor and pledgee. In such case the pledgee has never been held responsible.

When we looked at this case, our first thought was that we must enter judgment for the plaintiff, for we were impressed with the belief that there was a transfer of the stock to the defendants, and that it was actually, or virtually, registered in the latter's name. But upon examining the evidence we were convinced that this was a mistake; for, while it would seem from the record that it was submitted to the jury whether the transfer to Mr. Henry was with the consent of the defendants, and therefore a transfer to them, it really never was so submitted. The position taken by the parties on the trial was that the question was one of law.

The plaintiff asked the court to charge that as matter of law the plaintiff was entitled to recover; while the defendants asked for a charge that upon all the evidence they were entitled to recover. It is evident that there was a question of fact for the jury, viz., whether the defendants consented to become share-holders, and whether the transfer to their president was with the understanding that it should be a transfer to them, or was subsequently recognized by them as such a transfer. There was evidence on both sides of this question, and the motion for a new trial must, therefore, be granted.

McKENNAN, C. J., (*orally*.) There is but one question in this case. We both agree that the mere holding of this stock by the warehouse company, as pledgee, would not render them liable to assessment under the act of congress unless there was an agreement that the transfer to the president should be a transfer to them, or unless they recognized such transfer as a transfer to them. The only question is whether the company is a registered share-holder. The name of Mr. Henry appears on the corporation books. Whether the warehouse company is a share-holder depends upon the authority given to him by the company. There was evidence on both sides, and the question is one of fact for the jury.

READING v. TEXAS & PACIFIC RAILWAY CO.*

(Circuit Court, E. D. Pennsylvania. October 28, 1880.)

1. NEW TRIAL.—VERDICT FOR TOO SMALL AN AMOUNT—WHEN NOT SET ASIDE.—When, in the opinion of the court, the verdict should have been for the defendant, upon the evidence, they will not, upon the motion of plaintiff, set aside a verdict in his favor because its amount was less than the evidence showed him to be entitled to, if entitled to recover at all.

Motion for New Trial.

This was an action of *assumpsit*. The declaration set forth an agreement by defendant to pay plaintiffs \$10,000 for obtaining the consent of the bond holders of the Shreveport & Texas Railway Company to a scheme of reorganization, and averred performance by plaintiff, and that subsequently defendants were satisfied with such performance, had paid plaintiff \$4,000 on account, and had acknowledged a balance of \$6,000 to be due. Plea, *non-assumpsit*.

Plaintiff failed to prove, on the trial, performance of the contract on his part, but testified that defendants had waived the complete performance, and that they had paid him \$4,000 on account, and acknowledged that a balance of \$6,000 was due. This testimony was contradicted by defendant's witnesses. The jury found a verdict in favor of plaintiff for \$1,000. Plaintiff alone moved for a new trial.

W. Henry Smith, for plaintiff.

George Biddle, for defendants.

McKENNAN, C. J., (*orally*.) The plaintiff here has circumscribed his case within very narrow limits. He has by his declaration bound himself to prove a promise between himself and the defendants, by which the latter agreed, in consideration of whatever he did in performance of his contract, to pay him the balance he now claims. He has been permitted to present his case to the jury in a double aspect—*First*, that his performance of his contract to obtain the signature of these parties to a paper to provide for the re-

*Reported by Frank P. Prichard, Esq.; of the Philadelphia bar.

organization of this railroad was acceptable to the defendants, and that so he was entitled to recover; and, *secondly*, the ground that no matter how he performed his contract these matters were subsequently arranged between the parties, and a promise had been made to pay the ascertained balance of \$6,000. As to the above grounds I was unable on the trial to see how the jury could find for the plaintiff. As to the first ground, the plaintiff was permitted to go into that, although under his declaration this was perhaps a mere matter of inducement. He was permitted, however, to show, if he could, performance of the contract. Now, it must be admitted that there was no actual performance of the contract proven. Taking all the evidence, I think the weight of it was against the plaintiff, and so presented it to the jury.

On the second point, as to the subsequent arrangement between the parties, the testimony of the plaintiff was not direct. He did not swear that there was an actual ascertainment of this balance. He merely says he understood it so. He does not testify to any unqualified promise. Under these circumstances, a verdict in favor of the defendants would have been satisfactory to the court. Now, the jury erroneously have found a verdict for a sum less than the plaintiff would have been entitled to recover if his case had been made out by satisfactory proof. But this is not prejudicial to the plaintiff. It does not do him any wrong. He has no right to complain. We do not sit here to correct formal errors made by the jury that do not hurt any one. The parties who are injured by this verdict are the defendants, not the plaintiff. But the defendants do not move for a new trial. The jury might have found a verdict generally for the defendants, but because the jury have given the plaintiff what he is not entitled to, it certainly does not lie in the mouth of the plaintiff to allege any wrong, nor is it the duty of the court to set aside the verdict.

Motion refused.

SPINDLE *v.* SHREVE and others.

(Circuit Court, N. D. Illinois. ———, 1880.)

1. **TRUST—CHILDREN—CREDITORS.**—The owner of property has the right to provide that his estate may be held in such a way that his children may receive the rents and profits of it during their lives, so as not to go to the benefit of creditors, if they should be improvident or unfortunate.

Nichols v. Eaton, 91 U. S. 716.

2. **SAME—SAME—SAME.**—In such case it is not necessary that a will should declare in terms that the property is to be held free from creditors, where such intent is sufficiently manifest from the language used.

Gwynn Garrett, for complainant.

Charles A. Gregory, for defendants.

DRUMMOND, C. J. Thomas T. Shreve, of the city of Louisville, Kentucky, during his life-time, was the owner of some real estate situated in Chicago, and made his will, under which the question in this case arises. At the time of his death he left several children, and for them he made this provision in his will: "As soon after my death as it can be conveniently done, I wish my executor, after first setting apart a fund sufficient to pay the above-named special devises and incidental expenses, to make out a full and complete list and schedule of all my estate, of every character and description, real, personal, and mixed, in the state of Kentucky and elsewhere, and hand the same to the following-named persons, to-wit, James W. Henning, A. C. Badger, and A. Harris, who, or any two of them, I desire to proceed to value it and divide it into five equal shares, upon the principles hereinbefore indicated. One-half of each share (which half I wish to be income-paying real estate) I desire to be set apart and conveyed to a trustee, to be held for the use and benefit of each child during his or her life, and then descend to his or her heirs, without any power or right on the part of said child to encumber said estate, or anticipate the rents thereof. But said trustee shall collect said rents, and, after paying taxes, insurance, and keeping the property in repair, pay the rent to the child in

person, quarterly, or as the same may be collected, according to the terms of the lease. The other half of each share I wish conveyed to each child in fee, to do with as he or she may please."

One of the children, Charles U. Shreve, became bankrupt after the terms of this part of the will were complied with, and after a certain portion of the estate was conveyed to a trustee for his benefit, in which were the lots of land situated in Chicago, so that the trustee, at the time that Charles U. Shreve became a bankrupt, held these lots as trustee, under this provision of the will; and the question made by the bill filed by the assignee is whether Charles U. Shreve had such an interest in this property that it passed to the assignee, and so could be held for the benefit of the creditors, or whether it was an estate which was to be held for his personal benefit for life, and over which he had no power or control, and which could not go for the benefit of his creditors.

I have come to the conclusion that under the provisions of this will there was no estate which passed to the assignee, but that the property in Chicago is to be held by the trustee to whom it was conveyed by the executor, for the benefit of the son during his life, and that the rents and profits of the estate are to be paid over to him personally, and that he has no power to transfer any interest which he has in the estate so as to defeat the provisions made in the will.

This will is attacked on the ground that the provision made for the son is contrary to public policy, and is, therefore, inoperative and void. I hardly think the authorities warrant that conclusion, and, if they do not, then the only question is, what is the legal effect of this provision in the will, and what was the testator's intention in relation to the estate which was to be held by the trustee? The authorities collected in the case of *Nichols v. Eaton*, 91 U. S. 716, show that it was competent for the testator to make such a provision as this, namely: to declare by his will that his estate, or any portion of it, might be held for a child's sole benefit during life, and in such a way that it could not be reached by creditors. I think the authorities cited establish, and such

clearly seems to be the opinion of the supreme court of the United States, that the owner of property has the right to provide that his estate may be held in such a way that his children may receive the rents and profits of it during their lives, so as to not go to the benefit of creditors, if his children are improvident or unfortunate. It seems clear to my mind that was the purpose of the testator in this case. It is true that he does not make use of the language employed in some of the wills which have come under the cognizance and examination of the court, where they have declared that the property is to be held free from creditors; but I think language equally explicit has been used in this clause of the will to show that was the intention of the testator. Looking at the general scope of the provisions that he made in relation to his children, this is manifest. For instance, he provides that certain portions of his estate shall be conveyed to trustees, so that one-half which he intends for the benefit of his children shall be conveyed to them absolutely, in fee, to be disposed of as they may see fit, thus giving them the absolute control over one-half of the estate which he directed to be held and enjoyed by his children. As to the other half, the will says that should be held in such a way that his children, during their lives, should not have control over it. The trustee is to hold it for the use and benefit of each child during his or her life, and then it was to descend to his or her heirs, without any power during all this time, or right on the part of said child, to encumber the estate or anticipate the rents thereof.

The object seemed to be to deprive the child of any power over the estate. It was to be held by the trustee. The child had no right to encumber the estate, or even to anticipate the rents accruing from it. And then, again, as if to render it perfectly clear, this additional clause is inserted: "The trustee shall collect said rents, and, after paying taxes, insurance, and keeping the property in repair, pay the rent to the child *in person*." My opinion is that, under this clause of the will, and under the deed of trust which the trustee has, and by which he holds the property in controversy in this case, he

cannot follow any direction or order which the child may give, or any instruction as to the rents whatever, but that he is bound to pay the rents to the child in person. The language of the will is, he must "pay the rents to the child in person, quarterly, or as the same may be collected." Now, if that is the object of the will, and if that is the duty of the trustee, as it seems to me it clearly is, then I do not see how any action of the child in relation to the disposition of the rents can defeat the purpose of the testator, or can remove from the trustee the obligation which is devolved upon him by the will, to pay the rents to the child in person. And so, by the terms of this will, it was the intention of the trustee to declare that, as to one-half of the provision he made for each child, that was to be a personal provision, and the rents and profits of the estate were to be paid to the child alone. And so, without going into the question as to the effect of the deed which the child has made, and which is attacked on the ground that it was fraudulent, or into the effect of any directions or instructions that he may have given in relation to the estate, I hold that it clearly is the duty of the trustee to pay these rents to the child in person, and that no interest in the estate passed to the assignee. Hence, the bill must be dismissed.

KETCHUM and another v. BLACK RIVER LUMBER COMPANY and others.

(*Circuit Court, W. D. Wisconsin.* ———, 1880.)

1. REMOVAL—CONTROVERSY—STIPULATION—ISSUE—EQUITABLE SUIT—
LEGAL CLAIM—REFERENCE—TRIAL.

In Equity. Suit to set aside and cancel a mortgage.
Motion to remove cause.

M. P. Wing, G. C. Prentiss and G. W. Cate, for plaintiffs.
Cameron, Losey & Bunn, for defendants.

BUNN, D. J. This action was begun in the circuit court of La Crosse county, Wisconsin, April 8, 1880. The plaintiffs

are citizens of Wisconsin. The Black River Lumber Company is a corporation created under the laws of Wisconsin. The defendants are citizens of Iowa. The action is in equity, and brought by the plaintiffs, who are corporators and stockholders in the Black River Lumber Company, against said company and against the other defendants, who, except the Bank of Fort Madison, are also stockholders in said company, for the purpose of setting aside and cancelling a certain chattel mortgage given and executed by the lumber company on March 29, 1880, and recorded in the proper office on April 1, 1880, to the defendant the Bank of Fort Madison, upon a large quantity of logs, being all the logs cut by said company during the winter of 1879 and 1880, to secure the sum of \$65,000 of cash advanced, claimed to be made by said bank to the company to carry on its business, and also to enjoin the defendants from taking possession of the logs, and for the appointment of a receiver to take charge of all the logs, lumber, and property of the company, of whatever nature, and manage and control and sell and dispose of the same for the interest of all concerned. An injunction as prayed for was issued at the commencement of the suit. On April 17th following the parties, by their attorneys, entered into a stipulation by which it was agreed that William R. Sill should be appointed by the court as receiver in the case, with all the usual powers of receiver, and in addition the power to manage and control the property, and sell and dispose of the same in the usual course of trade, for cash or on credit, and apply the proceeds to the payment of the company's debts in such order of preference as in the opinion of the receiver should be just, and as the court might direct; also, that as soon as such receiver should be appointed and his bonds approved that the mortgage to the defendant bank should be cancelled, but that all sums of money advanced by the bank, whether before or after the execution of the mortgage used in caring for and preserving the property, or in payment of the debts of the company, should be a charge against the company. The receiver was appointed on the same day, and took charge of the concerns of the company. It was after-

wards stipulated by the parties and ordered by the court that the receiver be authorized and directed to investigate the amount, validity, and *bona fides* of any and all claims against the company. On July 14th the Bank of Fort Madison, by its attorney, filed a petition setting forth the indebtedness to it and to others of the company, and the giving of the chattel mortgage as a necessity to raise money to carry on the business and pay the debts; that the company was out of funds and wholly unable to meet its obligations, or to pay the claims which were liens on the logs; that the laborers who put in the logs and the persons who furnished supplies were pressing their claims; that the company was insolvent and had stopped payments; that the property of the company consisted of pine logs in Black river which were running down that river in the spring; that the company could not raise money to employ men necessary to care for the logs, and that the property was in danger of being scattered and destroyed; that after the mortgage was given the said defendant took possession of the logs and run them down the river, hiring and paying men, and furnishing supplies for the purpose, thus preserving the property for the receiver of the company and the creditors, and in so doing advancing \$24,584.16, which the bank asks shall be adjudged a just claim against the company and paid as a preferred claim.

On July 16th, by order of the court, the matters charged in the petition were referred to Thomas A. Dyson to take testimony and report the same to the court. Afterwards, on August 6th, the order of reference was modified so as to restrict it to the taking of such evidence as might be offered, leaving it to the parties to take the depositions of witnesses to be used upon the hearing in the usual way. On September 6th the defendant the Bank of Fort Madison filed an answer to the complaint, among other things setting up the claim covered by its previous petition, and demanding that it be adjudged to be a preferred claim, and also a petition praying a removal of the case to this court.

The defendant's counsel now move to have the cause docketed in this court, which motion is resisted by the plaintiffs

upon several grounds: *First*, that the stipulation by which a receiver was appointed and the chattel mortgage cancelled put an end to the controversy; *second*, that the claim of the defendant bank, set up in its petition and answer, is a legal counter claim, and not triable in an equity case; *third*, that there has been no issue joined on the defendant's answer or petition, and therefore there is no controversy; *fourth*, that the defendant, by stipulating to have the petition referred to take testimony, and by appearing before the referee and taking testimony, has waived its right of removal.

I think neither of these objections good.

1. The stipulation did not put an end to the controversy. It but changes its form and scope in a degree. The suit and much of the controversy still remains. The mortgage itself is not in issue, but the settlement of the affairs of the lumber company, under a receivership, as well as the just grounds, validity, amount, and preference of the claim of the bank over the creditors, are still unsettled, and on controversies still pending, if not fully at issue.

2. That these controversies are not as fully at issue as they might be by the filing of a reply, is no objection to a removal. If no reply should ever be filed it would still be incumbent on the defendant to establish, by proof, the just amount and grounds of its claim, and to satisfy the conscience of the court in regard to its alleged right of preference. It is not like a mere default when there is no judicial function to be performed.

3. The objection that the claim of defendant is a legal claim and cannot be tried in this suit is untenable. Considered as a legal claim, it is still a proper matter of controversy in a suit where one of the express objects is to close up the present affairs of the company, so far as the sale of the property and payment of the debts are concerned.

The court might, in such a case, order the issue to be tried by a jury, upon the law side of the court, but the fact of its being a legal, as distinguished from an equitable, claim, has no bearing upon the question of the right of removal. But I think in a suit in chancery, like this, the claim which the

bank makes is an equitable claim, and properly set up and made in the manner it is. Whether it is well founded or not is one of the controversies in the case, and which properly exists between the Bank of Fort Madison and the Black River Lumber Company, and which can be wholly settled and determined, as between them, within the meaning of the second subdivision of section 2 of the removal act of 1875; as it is well settled that the position of the parties on the record, as to being plaintiff or defendant, is not material, provided there is such a controversy.

The lumber company as well as the bank are named in the complaint as defendants. But this controversy is substantially between the bank as plaintiff, and the lumber company as defendant, and may be determined wholly as between them without the presence of the other parties, though, as stockholders, they would have an indirect interest. That interest is legally and fully represented by the corporation.

4. The reference of the petition to take testimony was not a trial of the case in any sense, so as to preclude a removal. Other evidence was to be taken upon deposition, and the final hearing was to be before the court. The petition for removal was made in proper time, and makes a clear case on its face for a removal, and there is nothing in the record to contradict the facts there set forth, and if the plaintiff wishes to put them in issue he can only do it by plea in abatement to the jurisdiction, in this court.

The case will be docketed in this court.

CANDEE & Co. v. THE CITIZENS' INSURANCE CO.

(*Circuit Court, D. Connecticut.* ———, 1880.)

1. INSURANCE—POLICY—ORAL PROMISE—CUSTOM—EVIDENCE.

Motion for a new trial.

SHIPMAN, D. J. This is a motion for a new trial of an action at law upon an insurance policy. The case was tried

to the jury and a verdict was directed for the plaintiff. As the questions which are actually presented in the bill of exceptions are neither novel nor intricate, it is not necessary, in my judgment, to consider them at length. The questions are fourfold.

1. Was evidence admissible to show an oral promise or agreement, alleged to have been made by the plaintiff prior to the issuing of the policy and not inserted therein, that upon the future happening of a certain event the policy should become void? The policy was issued in accordance with the permission and authority conferred by the defendant. There was no mistake in its terms, which were clear and definite. The defendant did not intend to insert the oral condition in the policy. The policy did contain numerous express conditions, upon the happening of which it should become void. The decision in *Insurance Company v. Mowry*, 96 U. S. 544, is decisive upon the point.

2. Was evidence admissible of an alleged custom of insurance companies, alleged to have been known to the agent of the plaintiff, that upon the happening of a future event the policy should become void, which condition was not inserted among the numerous, detailed, and clearly-expressed conditions subsequent to the policy. This unexpressed condition was, in my opinion, inconsistent with the written terms of the contract, and was excluded therefrom by necessary implication, for the policy apparently fully expresses the terms upon which it was issued, and the conditions upon which it was to become void. It is not admissible to add to the carefully-drawn and accurately-defined provisions of an express contract, like an insurance policy, a new stipulation contained in an unexpressed custom. *Partridge v. Ins. Co.* 15 Wall. 573; *Oelricks v. Ford*, 23 How. 49.

3. Should the question of termination by mutual consent have been submitted to the jury? It is not necessary to consider whether this defence was set up in the notice, for the evidence of termination by consent was so scanty that there was no real question to submit. *Pleasants v. Fant*, 22 Wall. 116; *Commissioners v. Clark*, 94 U. S. 278.

4. Nothing need be said in regard to cancellation, because, upon the defendant's testimony, the policy never was cancelled, even under the usages of insurance companies and agents in the city of New York.

The motion for a new trial is denied, and stay of execution is removed.

WEST, BRADLEY & CARY MANUF'G CO. v. ANSONIA BRASS & COPPER CO.

(Circuit Court, D. Connecticut. ———, 1880.)

1. CONTRACT—WARRANTY OF QUALITY.

Assumpsit.

Charles R. Ingersoll, for plaintiff.

Wooster & Torrance, for defendant.

SHIPMAN, D. J. This is an action of general *assumpsit* which was tried by the court, the parties having by agreement waived a trial by jury. The plaintiff's account, upon which the suit was brought, is for clock springs of various kinds which were furnished by the plaintiff to the defendant between July 8, 1875, and February 23, 1876, upon the defendant's orders. The principal of the account was \$1,552. It is not denied by the defendant that it received the goods which were thus furnished, and that they have not been paid for. The defence is the recoupment of damages resulting from the breach of the plaintiff's warranty of the quality of the clock spring which it sold to the defendant.

In the summer of 1874 the plaintiff, through Mr. Alanson Cary, its authorized agent, solicited from the defendant orders for clock springs. The defendant was largely engaged in the manufacture of clocks. The plaintiff was an extensive steel-spring manufacturer, and had just commenced to make polished clock springs. The defendant had been buying its springs from Edward E. Dunbar, of Bristol. The Dunbar spring was of excellent quality and had a good reputation. Mr. Carey, before any orders were given, showed the defendant

his samples of springs and received specimens of the Dunbar spring, and had two interviews with the defendant's superintendent and the foreman of the movement department at Ansonia, and one interview with the superintendent and the New York agent at New York. At Ansonia, Mr. Cary said that he (meaning the plaintiff) would guaranty his springs to be equal to the Dunbar spring, and that they would run more evenly than those which the defendant was using. It was understood that plaintiff's springs would be but seven and a half feet in length, while the Dunbar spring was nine feet long. The representation and the guaranty of Cary were that his seven-and-a-half-foot spring would be equal in efficiency to the nine-foot spring of Dunbar. The eight-day spring of Dunbar ran with uniformity at least eight days. This guaranty was given as an inducement to the defendant to become the plaintiff's customer. The additional inducements were a lower price than that of the Dunbar spring and an exchange trade.

While these negotiations were going on, and before any orders had been given to the defendant, Mr. Cary sent defendant, on September 24, 1874, one of the plaintiff's clock springs, and wrote the defendant, among other things, as follows: "One thing we can guaranty, that they [the springs] will run more uniform than anything you have ever used, and will, also, guaranty them equal to any French spring made."

Samples were sent by the plaintiff and tested to a certain extent. These negotiations finally culminated in an experimental order for 500 springs, about November 1, 1874, which were sent November 12, 1874, and the defendant replied that he would have them thoroughly tested and give a decision. The test was apparently satisfactory, for orders followed and continued to be given until February 23, 1876, at which date goods to the amount of about \$14,450 had been furnished and had been paid for, with the exception of the bill of \$1,552, now in suit. During the first part of the time, modifications in thickness and in minor particulars were suggested or directed by the defendant, which suggestions were complied with.

The representations which were made by the plaintiff were not mere expressions of opinion, but amounted to a warranty of quality; and this warranty was not intended to be temporary, and to terminate with the selection of particular sizes and dimensions, but it was intended to be a guaranty, for a reasonable time after the defendant had given its custom, that the plaintiff's springs should be equal in quality and efficiency to the Dunbar springs of nine feet in length, which were used for the same respective purposes. The defendant did not test its movements except by starting them in running order. They were speedily put into cases, or they were boxed and sent to the New York office. There the movements were fitted and were set running. The eight-day movements ran eight days and no imperfection was apparent. They were sold to wholesale dealers, and by them to retailers.

After awhile complaints began to come back to the defendant in regard to these clocks, and it was discovered that the springs lost their elasticity after being wound a number of times, and, being seven and a half or eight feet long, they ran down before the expiration of the eight days. There was a want of permanent power in the spring, but to what the lack was due the plaintiff's witnesses did not know. This defect existed only in the eight-day springs, and it existed both in the time and strike springs. Clocks were returned, orders were countermanded, and defendant subjected to annoyance, loss of reputation, and to direct pecuniary damage. The testimony as to the general annoyance to which it was subjected by reason of this imperfection was abundant. The evidence as to items of direct pecuniary damage was not abundant. The plaintiff's bill and interest thereon, to September 25, 1879, was \$1,984.55. The immediate and direct pecuniary damage to the defendant, resulting from the plaintiff's breach of warranty upon said eight-day clock springs, was, with interest from the dates of the respective items of damage, at least the sum of \$1,984.55, and I do not find affirmatively that it exceeded said sum.

I therefore find the issue for the defendant, and that judgment should be for the defendant to recover its costs.

ONDERDONK v. FANNING and another.

(*Circuit Court, E. D. New York.* ———, 1880.)

1. **INFRINGEMENT—PRELIMINARY INJUNCTION.**—A motion for a preliminary injunction will be granted to restrain the manufacture and sale of lemon squeezers with a conical or flat bed, upon the ground that they infringe a patent for similar lemon squeezers with a convex bed, where such patent was issued originally to the defendant and sold by his wife, together with the tools and stock, to the plaintiff.
2. **SAME—NOVELTY—VENDOR AND VENDEE.**—In such case, on such motion, the defendant will not be heard to dispute the novelty or utility of the invention described in the patent.

Foster, Wentworth & Foster, for plaintiff.

E. H. Brown and E. M. Wight, for defendants.

BENEDICT, D. J. This case comes before the court upon a motion for a preliminary injunction to restrain the defendant from making and selling certain forms of lemon squeezers, upon the ground that they infringe upon a patent for an improvement in lemon squeezers issued to Josephine P. Fanning and Isaac Williams, as assignees of the defendant John Fanning, dated July 15, 1879, and numbered 217,519.

The plaintiff's patent was originally issued upon the application of the defendant and his oath that he believed himself to be the original and first inventor of the improvement described in the patent issued in accordance with such application. Subsequently Josephine P. Fanning assigned her one-half interest in the patent to the plaintiff. Thereafter Isaac Williams assigned to the plaintiff the undivided third part of his interest in the patent. Williams, having refused to join as complainant in the bill, has been made a defendant; but John Fanning alone is charged with having infringed the patent.

There is no controversy in regard to the description of the machines which the defendant John Fanning is making. They are in two forms, each form precisely similar to the machine described in the plaintiff's patent, with the single exception that the perforated bed, on which the lemon is placed when subjected to the action of the presser, is in one case slightly

conical in form, and in the other flat, while in the plaintiff's machine this bed is slightly convex. Upon a motion like the present, when the defendant is the original inventor of the plaintiff's machine, upon whose application the patent was issued, and where the patent was sold to the plaintiff under the circumstances stated in the moving papers, no injustice will be done by refusing to permit the defendant to be heard to dispute the novelty or utility of the invention described in the patent. The only question that I feel bound to consider upon this motion is whether the machines being made by the defendant constitute an infringement of the plaintiff's patent upon which the plaintiff sues. The contention on the part of the plaintiff is that these machines do infringe upon the third and fourth claims of that patent. These two claims of the plaintiff's patent are for a combination of certain old elements in such a way as to produce certain results. As before stated, the defendants' machines present the same elements, combined in the same way, as in the plaintiff's machine, save only that in the defendants' machine the form of the bed is different. In regard to the machines made by the defendant, wherein the bed is slightly conical, it has been but faintly denied that the action of the machine is substantially similar to plaintiff's machine. It is manifest that it produces the same result in the same way. The conical bed in the defendants' combination is the equivalent of the convex bed in the plaintiff's combination. No invention was required to substitute a conical bed for a convex bed, nor was any different result attained thereby. This form of machine, therefore, is an infringement upon the plaintiff's patent, and as to this form the plaintiff is entitled to an injunction. In regard to the other form of machine made by the defendant, where the perforated bed is flat instead of convex, as in the plaintiff's machine, the identity is not so obvious as in the case of the conical bed, but I incline to the opinion that this form is also an infringement upon the plaintiff's patent. The effect of the convex form of perforated bed in the plaintiff's machine is to spread the lemon when subjected to the action of the presser; and there is evidence in the moving

papers that a lemon placed upon a flat bed of the defendant's machine, when subjected to the operation of the presser, will be spread out in the same manner as in the machine when the bed is convex. If this be the fact, all the other points of the machine being the same, it is not seen how it can be successfully contended that making the bed flat instead of slightly convex, as in the plaintiff's machine, changes the combination or avoids the plaintiff's patent. But it is said if a flat bed be held to be the equivalent of a conical bed, the plaintiff's patent is void for want of novelty; and several patents have been put in evidence which it is supposed anticipate the plaintiff's patent, unless it be confined to the convex bed. I do not, however, discover in any one of these prior patents the combination described in the third and fourth claims of the plaintiff's patent, considering these claims to cover a combination having any form of perforated bed that will spread the lemon when subjected to the action of the presser. But if there be a doubt here, the plaintiff is entitled to the benefit of it upon the motion. Under the circumstances of this case, equity requires that the defendant, upon whose application the plaintiff's patent was granted, and whose wife sold the patent, together with tools and stock, to the plaintiff, and who is wholly insolvent, should not be permitted to make machines so nearly similar to that described in the plaintiff's patent, and, by disposing of them at a lower price, destroy the value of the property bought of his wife, until his right to do so has been established by final decree, and this the more when, as here, the defendant is the only person who disputes the plaintiff's claim to the exclusive right to make such machines.

The motion for injunction is therefore granted.

HOWES and others v. McNEAL.

(Circuit Court, N. D. New York. —, 1890.)

1. PATENT—EVIDENCE—FILE WRAPPERS.—File wrappers are not competent as evidence, in a suit on a patent, to show the reduction to practice and use of inventions claimed to be prior, so as to invalidate such patent.

C. E. Sprague, for plaintiffs.

W. S. Farwell, for defendant.

BLATCHFORD, C. J. In this case a motion is made by the defendant that copies of three file wrappers, contents, and drawings, in the matter of three several letters patent, may be made a part of defendant's exhibits and proofs, with the same effect as if they had been put in evidence when said three letters patent were put in evidence, or that the suit be referred back to the examiner, with leave to the defendant to introduce such evidence, or that it be referred back for both parties to introduce further proofs; and that the interlocutory decree made herein be so far opened as that the defendant have leave to reargue the case, after such new evidence shall have been received, with the same effect as though the same had never been argued.

The object of introducing in evidence such file wrappers is stated to be to show that the inventions described in the several patents were made at dates as early as the oaths to the specifications. That is not the proper way to show the reduction to practice and use of the inventions claimed to be prior, so as to invalidate the plaintiffs' patent. That must be shown by direct evidence of the construction and use of the machines. Nothing from the patent-office can be admitted in evidence of earlier dates than the patents. All such evidence would be hearsay and secondary. A patent is allowed, by statute, to speak as a public grant; but the preliminary papers are merely the declarations of third persons not parties to this suit, or connected with them in interest or title. The evidence is not competent.

It may be added that if the three file wrappers were competent as evidence, no sufficient legal excuse is shown for not having sooner applied for leave to introduce them.

The motion is denied in all its branches.

CROWELL, MASTER OF STEAM-SHIP ROMAN *v.* THE SCHOONER
THERESA WOLF.*

(District Court, E. D. Pennsylvania. October 1, 1880.)

1. ADMIRALTY—CROSS LIBEL—ADMIRALTY RULE 53—WHEN CLAIMS DO NOT ARISE FROM SAME CAUSE OF ACTION.—Upon a libel *in rem*, filed for damages caused by a collision, a cross libel cannot be sustained for salvage on account of services rendered to the injured vessel after the collision. Such a claim does not arise out of the cause of action on which the libel is founded, within the meaning of the fifty-third admiralty rule.

In Admiralty.

In this case a libel *in rem* had been filed by the master of the schooner Theresa Wolf against the steam-ship Roman, for damages caused by a collision off Great Egg harbor, alleged to have been occasioned by the negligence of those in charge of the steam-ship. The owners of the latter filed an answer denying negligence on the part of the steamer, and alleging that the cause of the accident was the neglect of those in charge of the schooner to exhibit a torch. Subsequently, the schooner not being within the jurisdiction of the court, a cross libel was filed by the master of the steam-ship, on behalf of himself and of the crew and of the owners of the steam-ship, alleging that when the collision occurred the master and crew of the schooner abandoned her, whereupon the master of the steam-ship sent men on board, fastened a line to her, and towed her into New York harbor, for which services he claimed salvage, and asked that the original libellant might be ordered to enter security in the usual form and amount,

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

or that proceedings on his libel might be stayed, under admiralty rule 53 of the United States supreme court.*

To this cross libel the original libellant filed *inter alia* the following exception:

Second. Because the cross libel in this case does not contain such counter claim arising out of the same cause of action for which the original libel was filed, as is contemplated by rule 53 of the supreme court in admiralty.

John A. Toomey, (Henry R. Edmunds with him), for exceptions.

H. G. Ward, contra.

BUTLER, D. J. The second exception is well taken. The claim set out in the cross libel does not grow or arise out of the cause of action on which the libel is founded. The case is not, therefore, embraced in the fifty-third admiralty rule prescribed by the supreme court.

Cross libel dismissed.

POPE and others v. THE SWISS LLOYD INS. CO.

(District Court, D. California. October 13, 1880.)

1. SEAWORTHINESS—IMPLIED WARRANTY—BREACH—VESSEL UNPROVIDED WITH GROUND-TACKLE REASONABLY FIT FOR THE EXIGENCIES OF A VOYAGE—CIVIL CODE OF CALIFORNIA, §§ 2681, 2683.

Libel on Policy of Insurance.

Hall McAllister, for libellants.

Milton Andros, for respondent.

HOFFMAN, D. J. Section 2681 of the Civil Code of California is as follows: "In every marine insurance upon a ship, or freight or freightage or upon anything which is the subject of

*Rule 53 is as follows: "Whenever a cross libel is filed upon any counter claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross libel shall give security in the usual amount and form to respond in damages, as claimed in said cross libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given."

marine insurance, a warranty is implied that the ship is seaworthy."

Section 2683: "When the insurance is made for a specified length of time, the implied warranty is not complied with unless the ship be seaworthy at the commencement of every voyage she may undertake during that time."

The policy in this case contains the following clause: "*Thirteenth*. It is hereby further agreed by and between the assured and insurers that the provisions of the Civil Code of California shall be conclusive and binding as regarding the warranty of seaworthiness, liability of insurers in case of prior, subsequent, or simultaneous insurance, and such other questions as are therein legislated upon and not otherwise provided for in this policy." The provisions of the Code thus became doubly obligatory upon the parties. In the great case of *Gibson v. Small*, 4 House of Lords Cases, 353, it was finally settled, by the law of England, that on a time policy effected on a vessel then at sea there is no implied condition that the ship should be seaworthy on the day when the policy attached.

Whether, in a time policy, there is not an implied warranty of seaworthiness at the commencement of the risk, so far as it is in the owner's power to effect it, and whether, where several voyages are contemplated, the owner is not bound to exercise reasonable care and pains to repair any damages the vessel may have sustained, and to put her in a seaworthy condition before commencing a new voyage, was not decided.

Even if it be considered that in such cases there is no technical warranty of seaworthiness, yet, if the ship should come into a port in a damaged condition before or after the commencement of the risk, and the owner or his agents neglect to make reasonable and practicable repairs, and the vessel be lost in consequence, it would seem that policy, humanity, and due regard for the rights of shippers should forbid a recovery by the owner from the insurers for a loss attributable to the insufficiency of the ship. See opinion of Lord St. Leonards in *Gibson v. Small*, *ubi supra*; opinion of Lord Campbell, *contra*. Also opinion of Mr. Justice Grier in

Jones v. The Ins. Co. Wall. Jr. 280-1. In this state these questions are, as we have seen, definitely settled by the *lex loci contractus*.

I have made the foregoing observations because it seemed to be supposed at the hearing that the provisions above cited of our Code were a startling and unprecedented innovation upon well settled and universally acknowledged principles—*First*, as the law of the place where the contract was made and where it was to be executed, (1 Parsons Ins. 132; *Cox v. U. S.* 6 Pet. 203; 1 Gall. 371;) and, *secondly*, because the obligation of that law was expressly recognized and agreed to by the parties to the contract.

The schooner *Caroline Mills* was insured at this port for one year from the fifteenth of April, 1878, "to be engaged as an inter-island trader among the Sandwich Islands." She proceeded from this port to Hilo, Sandwich Islands, where, by direction of her owner, she commenced a voyage from Hilo to Honolulu *via* the way ports. On the ninth day of the voyage, after stopping and discharging cargo at several way ports, she was driven ashore and totally lost at the port of Honokoa.

The defence set up is breach of the implied warranty of seaworthiness, in this: that the vessel was not provided with ground tackle reasonably fit to perform the services, and to meet the ordinary exigencies of the voyages contemplated by the parties.

This is the only issue in the case, and upon it the evidence leaves, in my judgment, little room for doubt.

1. It is not denied that at the owner's suggestion the master "re-enforced" his chain cables by attaching to the anchors six-inch hawsers. This arrangement the experts condemn as improper and inadmissible, partly from the impossibility of dividing the strain with any approach to equality between a chain cable and a hempen hawser, owing to the great difference in elasticity of the materials of which they are composed, and partly from the liability of the hawsers to become chafed, or be cut by the chain or by rocks on the bottom—a danger more than ordinarily great in the inter-island navigation of

the Hawaiian islands, owing to the presence, almost invariably, of coral reefs. The fact that this mode of strengthening his ground tackle was resorted to, seems to involve the tacit admission that the cables alone were insufficient.

The master himself testifies: "I knew the chains were old and weak, so I attached a hawser to the anchors to strengthen the chains." The mate, whose testimony is in some respects more favorable to the libellants than that of the master, says: "The reason the hawsers were attached to the anchors was because the chain cables were weak."

2. The loss of the vessel does not appear to have been caused by any sudden, unforeseen, or irresistible violence of wind or sea. No storm prevailed. It is even doubtful whether the trade winds which caused the vessel to part her cables blew with any unusual violence.

The master, who had been as sailor and master engaged in the inter-island navigation for 30 years, says: "The wind was as usual for that place. Easterly trade winds, moderately strong, and the usual long, heavy swell; and the surf on the rocks was not high." And he adds: "If the chains had held, the vessel would have been in no danger. The weather was perfectly safe for anchorage off Honokoa. I have anchored there in much worse weather in safety."

The mate's account of the cause of the disaster is slightly different. He says: "It was occasioned by the wind and weather, which was heavier than usual. The wind was quite high that day; weather bad, sea rough. I have been at that place seven times before; never saw it so rough before. * * The wind was high, and a heavy swell was setting directly on shore. The usual wind is more to the east, which sets the swell along the shore at this place."

It is apparent from this testimony that though the witnesses differ as to whether the wind blew with any unusual strength, yet they both agree in ignoring the existence of any storm or extraordinary violence of the elements which a well-found vessel could not have anticipated and successfully encountered.

It appears from the mate's testimony that when the vessel had approached to within a couple of miles of the shore, the master decided "to stand off shore again and to wait a little longer to see if the weather would allow of his anchoring in safety." This was at 6 A. M. The mate then went below and did not come on deck again until 11:30 A. M., at the anchorage, where the disaster occurred.

I do not understand that the skill and competency of the master are impeached. His experience as master engaged in the inter-island navigation is of 20 years. He is still in the employ, and appears to retain the confidence, of the owner. When, therefore, after deciding to stand off and wait until the weather should permit him to anchor in safety, he resolved to stand in and bring his vessel to anchor, it must be inferred that the state of the wind and weather were such as in his judgment to justify the attempt. The result showed either that he committed an inexcusable blunder in placing his vessel in a position where ground-tackle of the usual and proper strength would be wholly incapable of holding her, or else that she was unprovided with such tackle; for it is to be noted that the vessel can scarcely be said to have come to anchor at all, for the chains and hawsers on both anchors parted almost instantly when the vessel surged upon them.

. I think the proofs in the case leave no reasonable grounds for doubt as to which of the alternatives above stated must be adopted, and that the disaster must be attributed to the weakness and insufficiency of the ground-tackle of the vessel, and not to the stupid temerity of the master in exposing his vessel to a visible and obvious peril which he had no right to suppose her capable of encountering.

I have not thought it material to enter upon the inquiry whether the chains with which the vessel was provided were of sufficient size for a vessel of her tonnage engaged in the coasting trade from this port. The fact that it was thought necessary to re-enforce them by hawsers is, as before remarked, an admission that they were not strong enough for the inter-island navigation on which she was about to enter,

and the result showed that they were inadequate to meet the ordinary incidents of that navigation, or perform the service which the master felt justified in expecting of them.

Libel dismissed.

THE TWO BROTHERS.

(*District Court, W. D. Tennessee. ———, 1880.*)

1. **PLEADING—SET-OFF.**—An indebtedness for a house cannot be pleaded in admiralty as a set-off to a claim for unpaid wages as pilot and carpenter of a vessel, in the absence of an allegation that it was agreed that the work performed as pilot and carpenter should be taken in payment for such house.

In Admiralty.

John B. Clough, for libellant.

J. M. Gregory, for respondent.

HAMMOND, D. J. This is a libel by Jesse M. Tate against the steam-boat Two Brothers, claiming for unpaid wages as pilot and carpenter on said vessel. The claimant, John T. Leaton, sets up in his answer "that at the time of libellant's shipping on said boat as carpenter * * libellant was indebted to him in the sum of 20 days' work, 10 to be performed by libellant, and 10 by another competent man, said work being by contract a balance due respondent for a frame house sold to libellant." And, in reply to the article claiming for wages as pilot, he says "that on or about the tenth day of June, 1878, he sold to libellant a small frame cottage residence situated at Fulton, Tennessee, valued at about \$125, with privilege to libellant to remove it from the place where located to a lot near by, furnished for the purpose by respondent to libellant; that it was to be paid for in work, and that when libellant settles for that, as in justice and equity he should do, there will not be due libellant any sum whatever." It is elsewhere said in the answer that "on a

fair settlement" there will be due respondent five dollars from libellant.

If this answer, which is excepted to by libellant, so far as it seeks the benefit of the set-off, had alleged an agreement that libellant would do this work as pilot or carpenter for respondent on this boat, in payment of what was due by him for the house, the defence would be a good one. It would not be, strictly speaking, pleading a common-law contract as a set-off, but setting up a special maritime contract, which, taken as a whole, would show that the libellant had no cause of action and had been paid for his services. But I do not find any allegation of such an agreement. The answer only says that the libellant was, at the time he shipped on this boat, indebted to the respondent for the house; in one place it says he was indebted in "20 days' work," and in the other, in the balance due on \$125, the price of the house. This is clearly pleading the indebtedness for the house as a set-off, and is by all the authorities inadmissible. 2 Pars. Mar. L. 717; 2 Pars. Ship, 433; *Willard v. Dorr*, 3 Masm. 161; *Bains v. The James and Catharine*, 1 Baldw. 544; *Snow v. Carruth*, 1 Sprague, 324; *Bearse v. Ropes*, Id. 331; *Nichols v. Trimlett*, Id. 361; *Dexter v. Munroe*, 2 Sprague, 39; *Kennedy v. Dodge*, 1 Ben. 311, 315; *The Lady Campbell*, 2 Hagg. Adm. 14, note; sustain the exceptions.

COUILLARD v. STEAMSHIP VICTORIA.

(District Court, D. Massachusetts. — 1880.)

1. NEGLIGENCE—FELLOW SERVANTS.—The owners of a vessel are not responsible for injuries sustained by a stevedore, through the negligence of a fellow servant, while unloading the cargo.

Halverson v. Nisen, 3 Sawy. 562.

Malone v. Western Transportation Co. 5 Biss. 315.

E. L. Barney and *E. J. Hadley*, proctors for libellant.

Brooks, Ball & Storey, for claimants.

NELSON, D. J. The libellant, while employed as a stevedore, in shifting coal in the between-decks of the British steamship *Victoria*, then lying at the wharf in East Boston, was injured by falling into the lower hold, through a hatchway which was negligently left open by other persons employed on board in discharging cargo, and this libel is brought to recover damages for the libellant's injuries. It is unnecessary to decide whether the libel is properly brought against the vessel, for it is clear it cannot be maintained against the vessel, unless it could also be maintained against the owners, and I am of the opinion that the owners are not responsible for the accident. There is no evidence in the case that the steamship was improperly constructed or equipped, or that the officers and men on board were incompetent or unsuitable, or that the accident was caused by any other failure of duty on the part of the owners. The libellant, and the persons through whose negligence the hatchway was left open, were fellow servants, engaged in the same general employment of the owners. It is too well settled to admit of discussion that the master is not responsible to those in his employ for injuries resulting from the negligence, carelessness, or misconduct of a fellow servant. *Halverson v. Nisen*, 3 Sawy. 562; *Malone v. Western Transportation Co.* 5 Biss. 315.

Libel dismissed.

GROGAN v. THE TOWN OF HAYWARD.

(Circuit Court, D. California. October 6, 1880.)

1. DEDICATION OF LAND FOR PUBLIC PURPOSES—DEFINITION.—“A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact.”
2. SAME—WHEN IRREVOCABLE.—Such dedication is irrevocable when third parties have been induced to act upon it, and part with value in consideration of it, although it has not been formally accepted by the public authorities.
3. SAME—SAME.—In such case the irrevocable character of the dedication is not affected by the fact that the property is not at once subjected to the uses designed.

Bowan's Executors v. The Town of Portland, 8 B. Mon. 232.

4. SAME—ADVERSE OCCUPATION.—No one can acquire by adverse occupation, as against the public, the right to a street or square dedicated to public uses.

*Hoadley v. The City of San Francisco, 50 Cal. 265.**People v. Pope, 53 Cal. 437.**Andros & Page, for plaintiff.**Mastick, Belcher & Mastick, for defendant.*

FIELD, C. J. This is an action for the possession of a parcel of land situated in the town of Hayward, Alameda county. The plaintiff traces title to the premises from one Guillermo Castro, to whom a grant of land, of which they are a part, was made by the former Mexican government. The grant was confirmed by the tribunals of the United States, under the act of March 3, 1851, and a patent was issued to the confirmee.

The defendant, the town of Hayward, claims that the premises are a part of a tract dedicated by Castro to the public use of the town previously to the conveyance under which the plaintiff asserts title. The main question for determination relates to the validity and permanence of the alleged dedication.

The facts of the case, as disclosed by the evidence, are briefly these:

In 1854, Castro, being desirous of founding a village or town on his land, selected for that purpose a portion of it,
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which included his residence, as a site for the town, and caused it to be surveyed into blocks and streets, and had a map made on which the streets were named and the blocks numbered. Upon this map the town was designated San Lorenzo. The map showed that the streets were to be 80 feet wide, and that the blocks were to be 400 feet in length and 300 feet in width. One of the blocks—the one bounded on the north by Webster street, on the east by Castro street, on the west by Watkins street, and on the south by Clay street—was marked "Plaza" on the map. The premises in controversy are a part of this block.

One of the streets, called Castro street, was coincident with the county road running between San Leandro, the county seat, and San Jose, the county seat of Santa Clara county. The map was filed by Castro for record on the second of December, 1854. Subsequently two sales of parts of blocks, bounded by streets as laid down on this map, were made by him. In 1856, for the purpose, as is said, of securing to himself a lawn or yard in front of his house, he caused the street bearing his name to be resurveyed, and he located it 66 feet further west than it was located according to the map of 1854. The block occupied by him as his residence was thus widened 66 feet, and all other blocks and streets west of him were pushed 66 feet to the westward. A new map was then made of the town, showing the streets and blocks as thus changed, and on the eighth of April, 1856, was filed in the office of the recorder of the county. Soon afterwards Castro street was opened, and the county road made to conform to it, and since then, now a period of over 20 years, has been continuously used as a street of the town and as part of the public highway from San Leandro to San Jose. A copy of the map was exhibited in the office of Castro to parties seeking to purchase lots in the town, and lots were sold by him and his agent, and deeds executed with reference to it, or the lots were bounded by streets designated upon it. The block marked "Plaza" was spoken of by them as reserved for public use, and sales of portions of it were refused for that reason.

The plaintiff derives whatever title he has from the pur-

chaser at a sale made in 1864 upon a foreclosure of mortgages upon the tract of land embracing the town of San Lorenzo, executed by Castro in 1858, 1859, and 1862.

The name of the town was subsequently changed from San Lorenzo to Hayward, and under this latter name was incorporated by the legislature in March, 1876. The act of incorporation authorized the board of trustees created by it "to provide for enclosing, improving, and regulating all public grounds at the expense of the town," and, of course, to take control of them for that purpose.

Sometime prior to January 5, 1877, Luis Castro, son of Guillermo, as county surveyor, by direction of the board of trustees, made a survey of the town in accordance with the map of 1856, and the survey was finally approved and the map officially adopted by an ordinance passed January 6, 1877.

The plaintiff, Grogan, at the time claiming under conveyances from Castro and the holder of the mortgages mentioned, (subsequently the purchaser on their foreclosure,) constructed warehouses on a part of the block marked on the map as the "Plaza," and occupied them from 1864 to 1877. In the latter year these warehouses were burned down, and soon afterwards the authorities of the town took possession of the ground as part of its public plaza. Hence the present suit.

Under this statement of the case there ought to be no doubt as to the judgment of the court. In the light of adjudications, almost without number, in the courts of the several states, and in those of the United States, the law as to what constitutes a dedication of private property to public purposes, so as to be beyond the recall of the original owner, would seem to be settled.

A dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact. If nothing beyond the declaration be done—if there be no acceptance by the public of the dedication, and no interest in the property be acquired by third parties—the dedication may be recalled at the pleasure of the owner. But if the dedication

be accepted by the public authorities of the place where the property is situated, or contracts for a valuable consideration be made by others founded upon a supposed appropriation of the property to the uses indicated, the dedication becomes irrevocable. In the one case the acceptance completes the transfer of the property, or easement in it, from the owner to the public; in the other case, the contract with the owner estops him from asserting any interest, except in common with the purchasers from him.

In the present case, the intent of Castro to dedicate the streets and the block marked "Plaza" in the town of San Lorenzo was manifested in the most open and public manner. The filing in the office of the county recorder of the map containing a designation of the streets and blocks, as set apart for public uses, was a public declaration of the fact. Whether, if nothing further had been done by him, there would have been any such interest acquired by the public as to forbid a subsequent assertion of ownership, may be questioned. But when by the sale of the property, by reference to the map filed, or bounded by streets marked upon it, other parties had become interested in the property set apart for public uses, the owner was precluded from asserting his original rights. The sale by the map, or with reference to the streets upon it, was a sale not merely for the price named in the deed, but for the further consideration that the streets and public grounds designated on the map should forever be open to the purchaser, and to any subsequent purchasers in the town. This was an essential part of the consideration. The purchaser took not merely the interest of the grantor in the land described in his deed, but, as appurtenant to it, an easement in the streets and in the public grounds named, with an implied covenant that subsequent purchasers should be entitled to the same rights. The grantor could no more recall this easement and covenant than he could recall any other part of the consideration. They added materially to the value of every lot purchased.

No formal acceptance by the public authorities of the dedication, upon which the counsel for the plaintiff so much insist,

was essential. No such acceptance could have been had until the town was organized by the legislature. Until then there were no officers of the public to express an acceptance, and Castro held the legal title of the property dedicated in trust for the public, being precluded by his sales from the assertion of ownership freed from the public easement. A formal acceptance by the public authorities of a dedication may be necessary to impose upon them the duty of protecting the property and keeping it in a condition to meet the uses designed,—as, for instance, to open and repair a street,—but it is in no respect essential to complete the dedication and preclude the original owner from revoking it. The dedication is irrevocable when third parties have been induced to act upon it and part with value in consideration of it. Nor is this irrevocable character of the dedication affected because the property is not at once subjected to the uses designed. In many instances, perhaps the greater number, there may be no present need of the land for the purposes contemplated, as in the case of streets and parks laid out upon a tract added to an existing city to meet its supposed future growth, or, as in the present case, upon a tract selected as a site for a new town. In such cases it is understood that the property will only be subjected to the uses intended as it may be from time to time needed to meet the growth of the place. If an immediate subjection were required in such cases, the object of the dedication would be defeated.

As already indicated, adjudications in cases similar to the one now before the court are numerous, and in all of them, without exception, the views here expressed are sustained. One of them—*Rowan's Executors v. The Town of Portland*, 8 B. Mon. 232—may be mentioned as especially learned and instructive upon the subject.

The change in the position of some of the streets 66 feet further west of their original position, as shown on the map of 1854, when only two sales had been made, does not appear to have met with any objection from the previous purchasers; and the subsequent sales according to the map of 1856, and the approval by the trustees of the town of the survey of 1877,

made in accordance with it, would seem to obviate all objections to the change, even if the plaintiff were in a position, as he is not, to contest its validity.

The mortgages, upon the foreclosure of which the land was sold and the grantor of the plaintiff acquired his title, were executed after this dedication had become irrevocable, and the purchaser at the mortgage sale took whatever rights he acquired in subordination to the interest of the public, represented since the incorporation of the town by its authorities.

As to the defence that the statute of limitations of the state has barred the action, it is sufficient to refer to the decisions of the supreme court of California in *Hoadley v. The City of San Francisco*, 50 Cal. 265, and *People v. Pope*, 53 Cal. 437. According to them, no one can acquire by adverse occupation as against the public the right to a street or square dedicated to public uses. The construction given by the supreme court of the state to the local statute is conclusive upon this court. It follows that the finding of the court upon the issues presented must be for the defendant, and judgment will accordingly be entered in its favor.

BROOKS and others v. FARWELL and others.

(Circuit Court, D. Colorado. October 20, 1880.)

1. REMOVAL—REVIEW.—Questions passed upon in a state court cannot be reviewed upon the removal of the cause to the circuit court.
2. PRACTICE—SERVICE OF PROCESS—NON-RESIDENT.—A party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial.

Parker v. Hotchkiss, 1 Wall. Jr. 269.

The Juneau Bank v. McSpedan, 5 Biss. 64.

———, for plaintiffs.

———, for defendants.

HALLETT, D. J. Brooks and the Purdy Silver Mining Company brought suit in the district court of Arapahoe county,

against John V. Farwell and another, in March last. Farwell appeared and filed a motion to quash the summons, or service of the summons, alleging in an affidavit accompanying the motion that he had been in attendance upon court in another suit brought by one of the plaintiffs, and that he was a resident and citizen of the state of Illinois, and had come here necessarily for that purpose, and so was exempt from service while in attendance on the court. Upon hearing that motion the court denied it, but gave leave to the defendant to set up the same facts in an answer in the nature, it is said, of a plea in abatement. Thereafter the cause was removed into this court, and the plaintiff now asks for judgment, claiming that the answer cannot be received; that it is not according to the course of pleading under the Code; that any answer that may be filed must go to the complaint, and that nothing can be averred against the summons, or service of the summons, by way of answer. As to that question, it must be assumed that that was passed upon in the district court of Arapahoe county, in overruling the motion to quash the service of the summons. In allowing the defendant to file an answer setting up the same matters, the court must have held that that was the proper practice—the proper course of procedure. That being decided there, cannot be reviewed or in any manner set aside in this court. We do not, on the removal of a cause from a court of the state, review or attempt to reverse any proceedings that may have been had there before the removal of the cause into this court. As to all questions that are passed upon in the state court before the removal of the cause, they are fully and finally determined so far as this court is concerned, and can only be reviewed in the supreme court of the United States, if there be error in them; so that this plea is to be received as well pleaded here, and as to the matter of the plea there can be no doubt as to its sufficiency. The authorities are clear to the point that a party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. Having been brought into such foreign

state by process of law, he cannot, while there, be called to answer in another action. *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *The Juneau Bank v. McSpedan*, 5 Biss. 64.

The motion will be denied.

HOYT and others v. WRIGHT.

(Circuit Court, D. Colorado. October 14, 1880.)

1. REMOVAL—JURISDICTION—PLEADING.—Want of jurisdiction must be pleaded, where an objection to the removal of a cause is made upon that ground, and such defect is not apparent upon the face of the record in the state court, or the petition for removal.
2. SAME—SAME—CONVEYANCE BY PARTY TO SUIT.—A *bona fide* conveyance of the property in controversy, by a party to the suit, for the express purpose of conferring jurisdiction upon the federal court, will furnish no ground for remanding a cause to a state court.

Petition to Remand.

———, for plaintiffs.

———, for defendant.

HALLETT, D. J. In cases removed from a court of the state, if there is in the record, either in the state court or in the petition for removal, anything showing want of jurisdiction in this court, the party objecting to the removal may rely upon that by motion to have the cause remanded. If, taking the facts appearing in the record and petition to be true, this court has jurisdiction, the party objecting to the jurisdiction must make his objection by plea to the jurisdiction,—that is, he must allege the facts in a manner in which issue may be joined, and according to the course and practice of the court, so that they may be properly determined,—and it has been determined by the supreme court that the method of doing that is by plea to the jurisdiction, and in that way only. Upon such a plea we know what course is to be pursued; we know how to consider it, how to ascertain its sufficiency, and how, if issue be joined upon it, to reach a conclusion as to the matter of fact.

This paper is called a petition to remand, and in it the pleader sets up a matter which is not shown in the record, and as a pleading it is something that we know nothing about, and we could not take any notice of it, if the matters alleged in it were such as would be sufficient to remand the cause, if true; but the matter stated in the petition is not in itself a ground for remanding the case. It is alleged that Mr. Mills was a party to this suit in the state court, and an owner in the property in controversy; that he conveyed his interest in the property to one of his associates, one of the plaintiffs, and thereupon moved on behalf of the other plaintiffs to transfer the cause to this court; that this was done for the purpose of conferring jurisdiction upon this court; "that the sale and conveyance by Mr. Mills to his co-plaintiff, Wright, and the discontinuance of the action as to himself in the district court of the county of Ouray and state of Colorado, was made for the sole and avowed purpose of giving this court jurisdiction of said case." If that is true exactly as stated, it is no ground for remanding the case, provided the sale was in fact made. A party having property may sell it for the express purpose of enabling his vendee to sue in this court, and if it be a real sale and not a sham, that is no objection to the jurisdiction; but, if the transfer is merely colorable,—if, notwithstanding the transfer, he still retains his interest in the property, and is still the owner of it,—then it would be a collusive proceeding, which, of course, would not confer jurisdiction. The question in such a transaction as this is whether there was a real transfer of the interest by which the vendee in the conveyance obtained a title, or whether it was colorable merely; whether Mr. Mills still retains his interest in it. If, by plea to the jurisdiction in the form which is prescribed by law, the defendant here is able to allege that Mr. Mills, being a party to this suit in the state court, without consideration, or in any way which was not effective to transfer his interest, and merely for the purpose of giving this court jurisdiction, transferred his interest to one of the other parties, and thereupon caused the suit to be removed, that

may be ground for remanding; otherwise we must retain the case here. I do not see that any order is to be made here; we take no notice whatever of the petition.

ORMSBY v. UNION PACIFIC RY. Co.

(Circuit Court, D. Colorado. October 13, 1886.)

1. DEMURRER—PLEADING.—A demurrer "to so much of the answer as sets up the special contract" will not be received by the court.
2. RAILROAD—CONTRACT—REASONABLENESS.—A contract between a railroad company and a shipper of horses stipulated that for injuries to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination, or from the place of delivery.

Held, that this clause of the contract was not applicable where the injury was the illness of the animals, and the extent of such illness could not be known until their removal from the cars, and probably not for some little time after such removal.

Demurrer.

———, for plaintiff.

———, for defendant.

HALLETT, D. J. In the case against the railroad company, the plaintiff alleges that he shipped certain horses over its line, and that they were detained on the way, at a place called Brookville, for a space of 24 hours, in consequence of which they were sick, and two of them died; that he was put to expense in taking care of all of them, and that some of them depreciated in value—those that were not wholly lost. To this the defendant sets up that there was a special contract in relation to the shipment of these horses; but the special contract does not in any way provide for the detention of the stock on the way. It says nothing on that subject; so that, as far as the first defence alleged here is concerned, the contract is not at all pertinent to anything that is alleged in the declaration. The plaintiff, in demurring to it, says that he demurs to so much of the answer as sets up the special contract. We do not receive a demurrer on such a specifica-

tion as that. The clerk would not know, nor would anybody, what is meant by saying "we sustain the demurrer to so much of the answer as sets up the special contract."

There are in the answer, however, some things which are in denial of the complaint, as that there was any detention of the horses on the way; that the horses were of the value alleged; and there is a charge of new matter: that the horses were sick before they were taken upon the railroad at all, and that they died in consequence of such sickness. All that is properly in answer to the complaint; and as to what is irrelevant and has nothing to do with the matters alleged in the complaint, if the demurrer could be sustained upon that ground at all, it would have to point out by line and word certain parts, so that we should know where we began and when we came to the end.

As to the last clause of the answer, which may be taken to be an independent answer in itself, that sets up a provision in the contract that for injuries to the animals shipped over the line of the road the owner should make a demand in writing of the agent of the company before removing them from the place of destination, or from the place of delivery. It may be that for some injuries this clause in the agreement would be effectual; but here, according to the charge of the complaint, the injury was illness of the animals, which could hardly be discovered until they should be removed from the car; and this clause in the contract would require the parties to hold them there at the depot ground, I suppose, until they could ascertain whether they were in good condition or not. That would be very unreasonable indeed. As to such matters as are charged in the complaint—an illness occurring to animals, the extent of which could not be known until they should be removed from the car, and probably not for some little time after their arrival here—it may be said that this clause in the agreement is of no effect; that the railroad company could not make any such provision in respect to stock shipped over their line. The demurrer will be sustained to the last clause or paragraph, or whatever it may be called, of the answer, and overruled to the other.

NORTHERN PAC. R. CO. v. BARNESVILLE & M. R. CO. and
others.

(Circuit Court, D. Minnesota. ———, 1880.)

1. BRIDGE—NAVIGABLE RIVER—NUISANCE—INJUNCTION.—A preliminary injunction to restrain the erection of a bridge across a navigable river will not be allowed, where it is shown that such bridge will not be an obstruction necessarily amounting to a nuisance.

Application of plaintiff for preliminary injunction to restrain defendants from erecting a draw-bridge across the Red river of the north.

Gilman & Clough, for the application.

Bigelow, Flandrau & Clark, Geo. B. Young, and R. B. Galusha, against.

NELSON, D. J. It is not clear to my mind that the complainant can maintain this suit in which an injunction is prayed. The Northern Pacific Railroad Company was chartered to construct and operate a railroad from Lake Superior to the Pacific ocean. The authority to build a road between these two points, thus giving almost a continuous route of transportation east and west across the continent, gave the chief value to its franchises. The road was not to be built for the purpose of securing the trade upon the navigable waters it crossed on its route, although the navigation of these waters might increase its revenues, and I am not fully satisfied that this navigation is so important that the value of the railroad would be seriously injured by anything that obstructed it. But, concede that an obstruction to the navigation of the Red river of the north, a navigable river which it crosses, would seriously impair the value of the road and affect, injuriously the private interests of the company so that it could enjoin such obstruction, the question is then presented, will the contemplated bridge, to be erected by the said defendants, be an obstruction and a nuisance?

If it will be a nuisance to the company, no legislative authority for its construction by the state of Minnesota would justify its erection, and no authority from the legislature of

Dakota territory could prevent its abatement as a nuisance unless sanctioned, perhaps, by the congress of the United States. It is doubtful whether the bridge is authorized to be built by the legislature of the territory of Dakota, but this point it will only be proper, in my opinion, to consider when an objection to its construction is made by the United States. The state of Minnesota, if it objects, can be heard in its own courts. An examination of the affidavits filed by the defendants shows that the bridge will not be an obstruction necessarily amounting to a nuisance, and following the principle adopted by the United States supreme court in the *Wheeling Bridge Case*, as I understand it, I shall not interfere with the erection of the bridge proposed by the defendants at this time. They may take the responsibility of its construction, and if it should be settled after it is built that it is a nuisance, and injuriously affects the complainant's private interest, it will be abated.

Motion for injunction denied.

AUDENREID and others v. WOODWARD.

(Circuit Court, D. Maine. September, 1880.)

1. JUDGMENT—PARTIES CONCLUDED—NOTICE.—A judgment is conclusive upon all parties directly interested, both as to the validity and amount of a claim, where such parties have received notice of the pendency of the suit.

Robbins v. The City of Chicago, 4 Wall. 657.

Chas. P. Mattocks, for plaintiffs.

C. W. Larrabee, for defendant.

Fox, D. J. This is an action for the recovery of the price of a cargo of coal, furnished by the plaintiffs to the defendant in March last, at the agreed rate of \$2.95 per ton, amounting to \$2,301, together with the further sum of \$62.40, advanced by plaintiffs to the master on account of his freight money. The coal was loaded at Weehawken on board the bark *Castalia*, bound to Portland.

The defendant does not dispute either of the items claimed in the present suit, but the controversy between the parties is upon the defendant's right to a set-off of the sum of \$317.22, paid by him to the master of the *Castalia* for demurrage at Weehawken, together with the expenses of counsel. On the arrival of the *Castalia* at this port a libel was filed by her master against her cargo of coal, claiming damages in the nature of demurrage. The cargo was seized by the marshal, and afterwards bonded by the defendant. Seasonable notice of the libel was given to the plaintiffs by the defendant, and they were requested by him to give instructions as to the matter, to which they replied, "they had no advice to give." The defendant notified them that he should hold them chargeable, and that they were bound to indemnify him from such suit, but they did not appear in defence of the cause, or in any way render any aid to the defendant. The case went to trial in the district court, and after a full hearing that court decreed to the libellant the sum of \$250 as damages, on account of the improper detention of said vessel, together with the costs, which amount was subsequently paid by this defendant.

The judgment of the district court in that suit was not only conclusive upon the defendant, but also upon the plaintiffs in this suit, both as to the validity of the claim there presented and the amount of damages. This is fully settled by the supreme court of the United States in *Robbins v. The City of Chicago*, 4 Wall. 657.

The only remaining question is whether the plaintiffs are bound to indemnify the defendant against the claim of the ship, by reason of the cargo being subjected to this liability through their fault.

The bargain for the coal was made wholly by telegraph and letter. Quite a number of such communications passed between the parties on the sixteenth and seventeenth of February, and it is sufficient to say that the result was, that on the 17th a bargain was concluded between them, by which the plaintiffs sold and the defendant purchased the cargo, the same to be loaded before the 20th. The same day the defendant char-

tered the *Castalia*, then at New-York, to proceed to Weehawken for the cargo. Her master reported at the shipping office of the Pennsylvania Coal Company, who were to furnish the coal, on the plaintiffs' account, on the eighteenth of February about 5 o'clock in the afternoon. The next morning the vessel was in readiness for loading, and the master demanded his cargo. It was not furnished him until the fourth of March.

After the bargain was completed between these parties for the purchase of the coal, the plaintiffs telegraphed to the defendant, on the seventeenth of February, as follows: "Pittston Company cannot load before February 20th; therefore, offer off." As this was sent after the bargain was completed, it could have no effect, unless sanctioned by the defendant. Instead of consenting thereto, on receipt of the telegram he at once replied: "I have assumed obligation to furnish the coal, and have chartered vessel for the same, and expect you to comply with your proposition;" and this telegram he confirmed by letter the same day.

The plaintiffs replied "that they would go to New York and endeavor to have the company furnish the coal," and on the 18th they advised the defendant, by telegram, "that the company would load the *Castalia*." Upon this state of facts, the contract being that the *Castalia* should be loaded by the 20th, and she being in readiness prior to that date, but the cargo not having been furnished to her until some days after, it is clear that this delay was caused by the plaintiffs, or by the company from whom they were to procure the cargo. Neither the vessel, nor the defendant being in fault, the plaintiffs are primarily accountable for the damages which the defendant has thus sustained by the delay.

They, however, rely on two grounds why they should not thus be held responsible—*First*, they contend that the delay in loading was occasioned by the great draught of the *Castalia*; and, *second*, that as the tides were at Weehawken in the latter part of February the vessel would have grounded in the loading dock if fully loaded, and thereby would have interfered with other vessels; that, in fact, she was loaded as soon as

the water and state of the tides permitted. Two replies may be made to this suggestion—*First*, the fact is by no means established that the *Castalia* would have grounded if she had been fully loaded on the twentieth of February. The evidence is that her master sounded in the dock and reported there was sufficient water, and he repeatedly demanded his cargo. *Secondly*, the record in the district court in the suit for demurrage is conclusive that the ship was not in fault, but that she was entitled to, and did recover, damages for the delay occasioned by the neglect to furnish her with a cargo at the time stipulated in the contract. After the notice given to the plaintiffs, it was their duty to have appeared in that suit and then interposed this defence, if they would avail themselves of it. Not having done so they must abide the consequences of their neglect, and are not now at liberty in this suit to contest the matters involved in the claims made in that libel, one of which was whether the ship had a valid claim for demurrage. That point having been there adjudicated in her favor, the same is no longer open for controversy.

The remaining cause suggested by the plaintiffs, for which they should be exonerated from liability to indemnify the defendant, is that the *Castalia* had no legal claim for demurrage, as she was loaded in her turn, and by the rules of the coal company vessels were to be loaded as they reported at the office of the company; but this defence to the set-off, in the opinion of the court, is also closed to the plaintiffs, as the decree of the district court determined that there was a valid claim in the ship's behalf for the damages caused by the delay to provide her with a cargo. If the ship was bound to wait her turn, and was loaded in her turn, then, of course, there was no fault on the part of the plaintiffs, and no good ground for claiming demurrage; but this question is involved directly in the decree in the district court, and was there adjudicated, and such decree is binding on the parties to this cause. If this view of the effect of the decree of the district court is, however, erroneous, and the question is now open for consideration, the same result must follow, as by the contract between the parties to the present suit the cargo was to be loaded

before the 20th. The *Castalia* reported the 18th. If her cargo had been in readiness for her she could have been loaded in 24 hours. The bargain between these parties was fixed and definite as to the time the vessel was to be ready for her cargo, and the cargo provided for her. It was not, therefore, at all dependent upon any rules of the coal company as to loading vessels in turn.

These plaintiffs, by express agreement, stipulated that the ship should be loaded by a certain day, and they must abide by their contract; and the fact that the coal was to be procured by the plaintiffs from a third party, by whose rules vessels were to be loaded in turn as they reported, can have no effect upon the rights of the parties here in court. Such rules may, perhaps, exonerate the coal company from liability to the plaintiffs, if the plaintiffs were cognizant of them, and by their dealings with the company assented to and became bound by them. It is not shown that the defendant, at the time he purchased this coal of the plaintiffs, had any knowledge of the alleged custom of the coal company in this respect.

It cannot, therefore, be considered as in any way modifying the express contract between these parties, that the vessel should be loaded by the 20th, and the plaintiffs must be held accountable for the delay, and must make good to the defendant the damages he has thereby sustained.

The claim in set-off is therefore allowed.

MASON, Receiver, etc., v. CLIFFORD.

(*Circuit Court, W. D. Wisconsin.* November 4, 1880.)

1. LEASE.—Neither the reservation of rent nor any particular form of words is essential to the creation of a lease.
2. CONTRACT—MASTER AND TENANT.—Contract construed, and *held*, under the circumstances of the case, not to create the relation of master and servant between the parties.

Fisk v. Farmington Manuf'g Co. 14 Pick. 491, followed.

Whitney v. Clifford, 46 Wis. 168, construing same contract, disapproved.

S. U. Pinney and W. F. Vilas, for plaintiff.

Raymond & Haseltine, for defendant.

BUNN, D. J. This action is brought to recover the value of a certain quantity of lumber destroyed by fire, charged to have originated from sparks proceeding from the defendant's shingle mill in a dry time and during a high wind. The case came on for trial at the June term, 1878, and was tried by a jury. The plaintiff, among other things, to sustain his action, which was grounded upon the defendant's negligence, introduced a written contract, of which the following is a copy:

"It is hereby agreed by and between A. F. Dodge, of the city of Stevens Point, in the county of Portage, and state of Wisconsin, and William J. Clifford, of the same place, that said Dodge shall work and operate, during the milling season of 1879, a certain shingle mill situate in the city of Stevens Point, which mill is now in the possession and under the control of said Clifford, and shall manufacture shingles from logs to be furnished by said Clifford as hereinafter stated.

"It is further agreed by and between said parties that said Clifford shall pay to said Dodge the following rates for manufacturing said shingles: for the brand known as Star A, 60 cents per thousand; and for the brand known as Shaded A, 42½ cents per thousand.

"It is further agreed by and between said parties that said shingles shall be made and put up in a good and workman-like manner, and that said Dodge shall hire and pay all the men employed in the manufacture of said shingles, and shall provide all brands, band irons, oil, nails, and files in the manufacture of said shingles, and shall pay for repairing all breaks in the machinery of the said mill when the cost of said repairs shall not exceed five dollars; any break in the machinery of said mill, the repairing of which will cost more than five dollars, to be paid for by said Clifford.

"It is further agreed by and between said parties that said Dodge shall load all shingles so manufactured as aforesaid on the switch of said mill; said Clifford to pay all expenses for loading said shingles over and above the sum of \$1.25 per

car, until such time as a new side-track to said mill shall be completed. After the completion of said side-track said loading to be done by the said Dodge, and included in said amount to be paid for manufacturing said shingles.

"It is further agreed by and between said parties that said Clifford shall remove, or cause to be removed, all slabs and refuse timber from the grounds of said mill, so that the amount of said slabs and refuse timber on the grounds of said mill shall not at any time exceed 10 cords.

"It is further agreed by and between said parties that said Clifford shall take an account of all shingles manufactured during each week at the end thereof, and shall credit said Dodge with the amount; and it is further agreed by and between said parties that said Clifford shall settle with said Dodge on the first day of each month, and shall at that time pay said Dodge the amount due for manufacturing said shingles at the price above stated.

"It is further agreed by and between said parties that said Clifford shall furnish to said Dodge good and suitable logs for shingles to be manufactured as aforesaid, said logs to be delivered in the mill boom by said Clifford, and that said Clifford shall keep said mill in good running order, and furnish logs as aforesaid in sufficient number to keep said mill running during the running season of 1877.

"It is further agreed by and between said parties that all shingles less than four inches, clear from knots in butt, may be packed and sold by said Dodge for his separate use and benefit, or said Clifford shall have the right to take said shingles, less than four inches clear, by paying said Dodge 25 cents per M. for manufacturing good shingles."

It appeared from the evidence that Dodge, at the time of the accident, was running the defendant's mill under this contract without any personal interference or control by the defendant; and the sole question is whether the effect of the contract is to give possession and control of the mill to Dodge, as lessee or otherwise, so as to make him liable and relieve the defendant; or whether Dodge is the agent or servant of Clifford, so as to render Clifford liable for Dodge's negligence.

When the plaintiff had rested his case defendant's counsel moved the court to direct a verdict for the defendant, and after argument a verdict was so directed, with leave to the plaintiff to have the question reviewed on a motion for a new trial before the full bench for misdirection to the jury.

The case turns on a pure question of law. There was no evidence tending to show personal negligence on the part of the defendant, and he is not liable unless the negligence of Dodge is imputed to him by reason of their relation of master and servant created by the contract.

Does the contract create that relation, or has it the effect to put the possession and control of the mill into the hands of Dodge during the running season? Some of the provisions of the contract are equivocal in their bearing, and are entirely consistent with either view. But the question can be fairly determined only by a comprehensive view of the various provisions taken together, and the effect to be given them as a whole. And we still think, after long and careful consideration of the contract, that the defendant is not liable. The question is not whether the contract is technically a lease of the premises, but whether the effect is to put the mill in the control of Dodge in his own right, and beyond the control and interference of Clifford. If such is the effect, and we think it is, then Dodge and not Clifford is liable for the negligence of Dodge and his workmen in running the mill. The rule that the tenant and not the landlord is liable for his own negligent acts in the use of the premises is not an arbitrary rule, but is founded upon deep and abiding principles of justice. The ground of the action in such cases is the personal negligence of the defendant. But if, without fault on his part, he has placed the use of the premises beyond his own personal control, in respect to the very matters whereof the complaint is made, then it is but simple justice that he should not be held liable.

It is true, there was no rent in terms reserved by the contract. Nevertheless, it is evident that Clifford gets his rent in the diminished cost of the shingles. Neither is the reservation of rent essential to a lease, nor any particular form

of words; but, as Bacon, in his Abridgment, says, "whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are themselves sufficient, and will, in construction of law, amount to a lease for years."

This instrument is in form an agreement. By its terms Dodge was to work and operate the mill during the milling season of 1877, which meant from April to November. The words, "which said mill is now in the possession and under the control of said Clifford," are merely descriptive of the property then in the hands of Clifford, and throw no light upon the intended relation of the parties after the contract was made. Dodge was to manufacture shingles at certain prices per thousand—60 cents for one brand, and 42½ cents for another—from logs to be furnished by Clifford. Dodge was to hire and pay all the men, furnish all brands, band irons, oil, nails, and files, and pay for repairing all breaks in the machinery, the cost of which should not exceed five dollars, and Clifford for all that cost more than that sum. Clifford was to put the mill in good running order, and furnish good and suitable logs for shingles, in sufficient quantities to keep the mill running during the season. Dodge was to load all shingles on the cars, on the switch of the mill, Clifford to pay the expense over and above \$1.25 per car until a new side-track should be completed, and after that the loading was to be wholly at Dodge's expense. These are the main provisions of the contract, and we think their effect is to give the possession and control to Dodge for the purposes therein indicated.

On one occasion the evidence shows they applied to Clifford to shut down his mill when the wind was blowing, and he referred them to Dodge, saying that Dodge had control of the mill, and that he (Clifford) had nothing to do with the running of it, and I think he was right. Dodge was, in his own way, and according to his own judgment and skill, and at his

own expense and for his benefit, to run and operate the mill for a determinate period, without interference or control from Clifford or any one, Clifford divesting himself of the control for the time being for the purposes indicated in the contract; and this is essentially what constitutes a lease, and is inconsistent with the relation of master and servant.

Apply any of the usual tests: Could Clifford, any time during the running season of 1877, turn Dodge out of the mill, or deprive him of the control of it? Or could he control Dodge in the running of the mill? Could he, under the contract, say to Dodge, "This mill must be run on such and such days, and during such and such hours, and not otherwise? If there is a dry time, or the wind is likely to come up, no fire shall be made and the mill must not run." Could he say who should be hired and who not, or how many hands should be employed, or what each should do, or regulate their time or wages, or judge of their competency? Could he discharge, or compel Dodge to discharge, an incompetent or careless hand employed in the management of the mill in those very respects wherein the negligence of a workman might cause damage to third persons? We believe he could not exercise such control, or do any of these things, under the contract; but that, on the contrary, Dodge was entitled to the possession and management of the mill during the life of the contract as against Clifford and all the world. But if he could not control Dodge in the running of the mill, Dodge was not his servant, and it is difficult to see on what principle of justice Clifford can be made liable for the personal negligence of those whom he has no authority to control. If Dodge had been a hired servant by the day or month, Clifford would have had full control of his actions and the men employed in the mill. He could then say how and when the mill should be run. In such case it would be but simple justice to impute the negligent acts of the servant done in the course of his employment to the master, and hold him liable for the consequences.

Again, suppose there were other expenses attending the

running of the mill, besides those expressly provided for in the contract, upon whom would the burden fall? I think upon Dodge, as the proprietor for the time being.

In *Fisk v. Farmington Manuf'g Co.* 14 Pick. 491, the defendants were owners of a cotton factory and mill power, and had purchased from the plaintiff the right of drawing off the water from his pond through his land below. The defendant had made a written contract with one Bird, by which Bird was to run the mill one year, and to manufacture for the defendants cotton shirtings, from cotton to be furnished by them, delivered at Boston, and for which the company agreed to pay Bird three and a half cents per yard for the cloth so manufactured by him at the end of each month. The cotton was to be used prudently and with care by Bird, and the mill kept in good running order by and at his expense, except the main gearing, which was to be repaired by the company if necessary; the waste to be accounted for by Bird, or delivered to the company. Bird, while running the mill, caused the water to be let off so rapidly as to overflow the plaintiff's meadow, and injure his hay and grass. The action for the damages so caused was brought against the company who owned the mill, and the court held that the effect of the contract was to give possession and control of the mill to Bird, and that the defendants were not liable.

This case is very nearly allied in its facts to the one at bar,—more nearly so than any other in the books,—and we think it an authority in point. We are aware that since the trial of this case the same question has been determined otherwise by the supreme court of Wisconsin. See *Whitney v. Clifford*, 46 Wis. 138. That case, depending on the same state of facts, was pending in the circuit court for Portage county at the time this case was tried and decided in this court. After the hearing here, the other case was brought on for trial in the state court and the same decision rendered at the circuit as was made in this court. An appeal was taken, and pending the motion for a new trial in this case the supreme court made a decision reversing that of the circuit court; and if it were a question of local law we should feel bound by

that decision. But the case is one involving the proper construction of a written contract, which is a question at general law, upon which the parties have a right to the independent judgment of this court. And after careful and earnest consideration of the opinion in that case, we are unable to concur in the conclusion arrived at.

The motion for a new trial is denied.

FARMERS' LOAN & TRUST Co. v. L. C. & S. W. Ry. Co.

(Circuit Court, D. Indiana. ———, 1880.)

1. RAILROAD—RECEIVER—LIQUIDATED DAMAGES—ORDER OF COURT—CONSTRUCTION.

———, for plaintiff.

———, for defendant.

DRUMMOND, C. J. On the first day of August, 1874, the city of Logansport entered into a contract with the Logansport, Crawfordsville & Southwestern Railway Company, and the Detroit, Eel River & Illinois Railroad Company, the object of which seems to have been to cause a certain portion of the Logansport, Crawfordsville & Southwestern Railway Company's road, which was at that time unfinished, to be completed so that it should extend to the city of Logansport; and to have a bridge constructed across the Wabash river, and to secure to the city of Logansport the permanent location and maintenance of the car manufacturing and machine shops of both roads; and, as a consideration, the city of Logansport agreed to issue \$80,000 in bonds of the city, payable in 20 years, with interest at 7 per cent. The railroad companies agreed, respectively, one or the other, to whichever it might belong under the contract, to go on and construct the bridge, and finish the road, and build and establish the machine shops at Logansport. The contract contained a provision that the shops were to be commenced, and so far completed, as to be of sufficient capacity to do the work and

repairs of the companies, on or before the first day of November, 1875, and they were to be increased in size and capacity as the business of the railroads might require. "And it is further agreed by the parties to this agreement that should the said railroad companies, or either of them, fail to faithfully and honestly perform all the agreements in this contract on their part, they, or either of them, shall pay to the city of Logansport, as agreed, and liquidated damages, the sum of \$40,000, without relief from valuation or appraisement laws."

At the time this contract was made, it was executed by the defendant company through its president, S. D. Schuyler. Afterwards, and soon after this contract was made, the Logansport, Crawfordsville & Southwestern Railway was placed in the custody of a receiver, by the order of this court. In September, 1874, the receiver, who had been president of the railway company, and who had executed this contract as such, made application to this court to enable him to carry out the terms of the contract, and on the third day of October, 1874, the court made an order in compliance with the application of the receiver. The order states that a portion of the road, viz., about five miles in length, extending from Clymer station to the city of Logansport, was unfinished, and that the same, when completed, would constitute part of the original line of the road, and that it would then enure to the benefit of the mortgage lien holders on the road. The order refers to the fact that the construction of the bridge across the Wabash river, at the city of Logansport, was necessary. It also speaks of the fact that the city of Logansport had donated the sum of \$80,000 to complete the unfinished portion of the road, and that the Detroit, Eel River & Illinois Railroad Company was interested in the extension, and proposed to advance and give in aid of the same the further sum of \$15,000. The order refers to the sum of \$95,000, composed of the \$80,000 on the part of the city of Logansport, and \$15,000 on the part of the Detroit, Eel River & Illinois Railroad Company, which were to be advanced on behalf of the object which the receiver had in view. The order then proceeds to state: "And that the whole sum necessary, in addition to the

said gifts and advances, to be expended by said receiver, to complete said road and bridge, will not exceed the sum of \$30,000. It is now ordered that he (the receiver) do expend such sum for the purpose aforesaid, and that he be empowered to enter into all contracts and agreements that shall be required for the purpose of the extension aforesaid. And as to all the moneys that may be expended, and all liabilities incurred, by said receiver in carrying out the provisions of this order, the earnings of said road are charged as with a first lien, prior to all encumbrances on said road."

The application of the city of Logansport is (the railway company having been sold under the order of this court on the foreclosure proceedings of the mortgagees) that a portion of the purchase money, which is now in the possession of the court, shall be appropriated towards the payment of the penalty which is imposed by this contract of August 1, 1874, on both the railway contracting parties; and, of course, on this railway, whose property has been sold. The proceeds of the sale being now in the hands of the court, the question is whether this can be done. I think it cannot, and that the court cannot make this order, nor grant the city of Logansport the relief which it asks. This is a penalty in the nature of liquidated damages, which the city of Logansport imposed on each of these contracting parties as a consideration for which it agreed, on its own part, to issue these bonds, and which have been issued. There can be no doubt, I think, as to what is the true construction of this order of the court: that it intended simply that the earnings of the road should be held and become a prior lien as against all encumbrances upon the road for the \$30,000, or whatever sum was necessary over and above the \$95,000 which was given by the other parties to complete this work. This being an expenditure of money made by the receiver, under the direction of the court, it would be an unreasonable construction of the order to hold that it included not only the money which the receiver might spend, but that which had been appropriated by the city of Logansport, and by the Detroit, Eel River & Illinois Railroad Company. The provisions of the order which the receiver

was to carry out, and for which, when executed, the earnings of the road were to be charged, as a first lien, prior to all encumbrances, was simply whatever might be spent by him over and above these two amounts. And it may be added that the receiver did not bring to the knowledge of the court, in his original and supplemental petition, the precise facts of the case, and so far as we know they did not appear to the court. The petition did not set up this contract, but only that this money had been appropriated by the city of Logansport, and by the Detroit, Eel River & Illinois Railroad Company. It said nothing about the contract, or the penalty which had been imposed by its terms upon each of these railway companies, but the receiver simply came to the court and asked for an order to make this expenditure of money, for the purpose of constructing the bridge, which would extend the road to Logansport and make the line complete. It is said that this is a part of the road which has been sold under the decree of the court, and that the mortgagees have the benefit of the contract which was made and the expenditure of the money. That is so, but the contract which the city of Logansport made was with the companies, and that city may have a valid claim against them. Of course, as this company is insolvent, we know that the contract is worth nothing, but in that respect it is not different from a great many other creditors who made contracts with this same railway company, and who do not pretend to come into court and ask for anything, because they know they are not entitled to relief. It is the misfortune of the city of Logansport, in common with that of a great many creditors of this and other insolvent railway companies.

I may add, that the application which is made by the city of Logansport, as the 20 years have not yet expired, does not allege it has paid these bonds, nor does it even claim it has paid the interest on them. The court does not know judicially that the city of Logansport has ever spent a dollar. It is true, it may be said to be liable on these bonds. That is a question we are not now called upon to decide, but, so far as the application is concerned, they do not claim that they

have paid anything, I take it that the main object which the city of Logansport had in making this contract, and in causing this subscription under the law of this state by a proper application of the voters to the city council, was to get the railroad finished to the city of Logansport, and probably to have the machine shops constructed there. That it has failed in that object is its misfortune, and I do not think the court can give relief by appropriating any portion of the money now in the hands of the court to the payment of this claim, and it will, therefore, be dismissed.

Ex parte GEISSLER.

(Circuit Court, N. D. Illinois. October 30, 1880.)

1. SUPERVISOR OF ELECTIONS—POWER TO ARREST.—Under the authority of the acts of congress a duly qualified supervisor of elections has the right, in the absence of the United States marshal and his deputies, to preserve order, and to arrest, without warrant or process, any person who interferes with him in the discharge of his duty as such supervisor.
2. SAME—REGISTRATION.—It is the duty of such supervisor, among other things, to see that no person is improperly registered, and he can therefore object, if the circumstances warrant it, to the registration of a person offering himself for such purpose.
3. SAME—INTERFERENCE—OPPROBRIOUS LANGUAGE.—The use of offensive and opprobrious language may, without any overt act, constitute an interference with such supervisor in the discharge of his duty.
4. UNITED STATES—REGISTRATION OF VOTERS—ELECTION OF MEMBERS OF CONGRESS.—The United States has the right to interfere in all cases where there is a registration of voters for an election of members of congress, and, when that interference occurs under the authority of a statute of the United States, there can be no law which is paramount to it, nor is such law in derogation of the rights of the states.

Ex parte Siebold, 100 U. S. 371.

Facts in this case considered, and held to constitute an arrest and not an assault by a duly-qualified supervisor of elections.

Habeas Corpus.

Mr. Leake, Dist. Att'y, for the United States.

Mr. Cameron, for the City.

DRUMMOND, C. J. The only question in the case is whether the petitioner was legally arrested, fined, and imprisoned for the act which was done by him, as it appears from the evidence before the court. The facts seem to be substantially these: That the relator was appointed by this court a supervisor of election under the acts of congress, and qualified as such, and went before one of the boards of registration in the first ward of the city of Chicago, to discharge his duty as such, and remained there during the most of the day on the twenty-sixth of October. The registration took place in the usual way under the laws of the state, and about 8 or half-past 8 o'clock in the evening, a man who called himself Miller presented himself for registration, and some questions were put to him by the judges and answers made, which threw some doubt upon his right to registration. They were of such a character as to induce the relator, as supervisor, to object to his registration, and in consequence of that an altercation arose between the supervisor and Dwyer, who came with Miller, as to his right to vote. Dwyer claimed to vouch for Miller, and that he was entitled to registration. The supervisor insisted, on the other hand, that he was not.

There seems to be but little doubt that, prior to the act of violence which is complained of, there was offensive language used by both parties. The supervisor, while insisting that Miller should not be registered as entitled to vote, may have and perhaps did act in a manner somewhat offensive. He is obviously a man of quite excitable temperament—he showed that as a witness on the stand—and it is possible, therefore, he did not act in as discreet and prudent a way as a man of different temperament would have done. It is also true, I think, that Dwyer became excited and used improper and, perhaps, opprobrious language to the supervisor; but it is to be recollected that while we can consider, for the purpose of determining what color is to be given to a transaction, the language which is used, we have to look at the acts themselves, in order to determine whether they are legal. And we must consider the different relations of these two persons, who have both used violent language to each other, and the cir-

circumstances of the case. Dwyer was a volunteer there. He was, so to speak, an outsider. He may have had the right to come in and give his testimony in favor of the person who was presenting his claims for registration; but Geissler was there, clothed with the authority of law, and entitled to the protection of the law, as an officer of the United States. They, therefore, occupied entirely different positions.

I can have no doubt that, under the authority of the acts of congress, Mr. Geissler had the right, in the absence of the marshal and his deputies, as was the case here, to preserve order, and to arrest, without warrant or process, any person who interfered with him in the discharge of his duty as a supervisor. It was his right, among other things, to see that no person was improperly registered. He could, therefore, object, if the circumstances warranted it, to the registration of a person offering himself for registration; and that the circumstances did warrant it, is clear, because some of the judges themselves were in doubt as to his right, and therefore the objection of the supervisor was properly made.

There can be no doubt, either, that no person had a right to molest or interfere with the supervisor in the discharge of his duty, even by the use of offensive and opprobrious language. That, without any overt act, might be a molestation and interference with the supervisor in the discharge of his duty. Neither can there be any doubt that there was more or less disturbance and disorder, which followed the use of excited language. According to the weight of the evidence, as I understand it, the supervisor did tell Mr. Dwyer not to interfere, or "to stop," or "shut up," or that he would be put out; to which Dwyer returned opprobrious language, threatening to strike the supervisor; and thereupon the supervisor, having insisted he should be removed or turned out, and saying that if no one else would do it he would himself, seized Mr. Dwyer, as some of the witnesses say, by the throat, and others say by the collar, or by the breast. It does not, perhaps, matter in what particular way. He did not strike Dwyer, and was himself immediately struck by Dwyer. The question is whether what was done by the supervisor was in

pursuance of his authority as an officer of the United States there present under the law.

I do not justify in all respects the manner of the action of the supervisor. It would have been much more creditable to him if he had shown more equanimity of temper; if he had not become so excited, and if he had not returned sharp, bad language to the same kind of language. But we must make allowance for the infirmities of human nature; and we cannot suppose that a man will always be unruffled when he is attacked, and when opprobrious language is used towards him. The question is, after all, had he the right to do what he did?

Had he the right to preserve order? Had he the right to arrest Dwyer? And was he in the discharge of his duty as a supervisor? And the fact that he may not have done it in such a quiet, smooth, regular sort of way as other men of a different temperament, does not render the principal act illegal. In other words, if a man, in arresting another, where he has the right to arrest him, pushes him with more force than perhaps may be necessary, it cannot, in general, affect the question of the legality of the arrest. So here it may be that the supervisor did not act as other men of a cooler temperament might have acted under the circumstances; but he had the right, I think, to arrest Dwyer, and to preserve order by removing him from the room. The difference between the two men, as I have stated, is that the one was an outsider and the other was clothed with the authority of the law.

There seems to be some misapprehension in the public mind as to the rights of the officers of the United States in cases of this kind, as though they were interfering with the rights of the state or of the city. It is not so. The United States has the undoubted right to interfere in all cases where there is a registration of voters for an election of members of congress, and where that interference occurs under the authority of a statute of the United States, there can be no law which is paramount to it; and, as the supreme court of the United States has said, there is nothing in derogation of the rights of the states in this. *Ex parte Siebold*, 100 U. S., 371. We should move on harmoniously in the one case as in the

other—each within its respective sphere—the United States as a national government, and the state as a government clothed with all the powers which affect us as individuals—our lives, our liberties, our property, our relations to each other as citizens of the state. But when the question of nationality and of the rights of the United States as a nation arises and has to be decided, then the national power and sovereignty override what is sometimes called the sovereignty of the state. Undoubtedly, therefore, the national government has the right to prescribe in what manner representatives in congress shall be elected, and how security is to be given to the rights of electors, in order to ascertain who are legally elected. So that, while I have criticised the action of the supervisor in the performance of his duty, as I think the circumstances warrant, and also the conduct of those who interfered with him, still I must hold, under the law, that he was acting in the line of his duty, and that it was not competent for any state authority to interfere with him in the exercise of his right as a supervisor.

The only question about which I have had any doubt since hearing the testimony in the case, is whether what the supervisor did could be treated as in the nature of a mere assault upon Dwyer, and not as an arrest. If it had been done without the prior words and acts proved; if, for example, the circumstances which occurred prior to the seizure of Dwyer had not been as they were,—namely, that he had requested Dwyer, no matter in what form of language, not to interfere in any way; that he had called upon others to put him out, or to arrest him,—then it would have been different; but having done that—having said what he did—I must hold that the act, which otherwise might have been merely an assault, must be regarded simply as a seizure, with perhaps more violence than was necessary, to remove the man from the room, because he said “If no one else will remove him I will do it.” The prisoner, therefore, will be discharged from custody.

*In re Doig.**(Circuit Court, D. California. October 22, 1880.)*

1. **INDICTMENT—WARRANT OF REMOVAL—DISTRICT JUDGE—REV. ST. § 1014.**—Where a district judge is applied to for a warrant of removal, and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offence against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant.

In re Buell, 3 Dillon, 116.*In re Clark*, 2 Ben. 540.

2. **MANSLAUGHTER—PILOT—NEGLIGENCE—REV. ST. § 5344.**—Section 5344 of the Revised Statutes provides that "every captain, engineer, pilot, or other person employed on any steam-boat or vessel, by whose misconduct, negligence, or inattention to his duties the life of any person is destroyed, * * * shall be deemed guilty of manslaughter." *Held* that, under this section, destruction of life is the essence of the offence.

*Habeas Corpus.**Philip Tease*, U. S. Dist. Att'y, for the United States.*Milton Andros*, for petitioner.

HOFFMAN, D. J. The return of the marshal shows that he holds the prisoner by virtue of a commitment by United States Commissioner O'Beirne, commanding him to receive into his custody and safely keep the said Thomas Doig to await the action in the premises of the United States district judge for the district of California. The offence for which the petitioner was committed is described in the commitment as follows: "That on or about the nineteenth of April, 1880, in the district of Oregon, and within the jurisdiction of the district court of the United States for said district, he, the said Thomas Doig, having then and there control and management of a certain steam-vessel called the Great Republic, as a pilot, did, by his misconduct, negligence, and inattention to his duty as said pilot, cause the death by drowning of the first officer and others of the crew of said ship or vessel, whose names are to me unknown." The complaint on which the original warrant of arrest was issued charged the prisoner with the offence of manslaughter on the high seas, but it appears by the commitment, and is admitted by the district

attorney, that the only evidence produced to the committing magistrate was a certified copy of an indictment found by the grand jury of the United States for the district of Oregon.

It is contended, on behalf of the petitioner, that the indictment nowhere alleges the crime to have been committed on the high seas or within the district of Oregon; but, on the contrary, it affirmatively appears that the offence, if any, was committed in Washington territory. The district attorney objects to the consideration by the court of this question, and contends that the duty of the district judge in the premises is purely ministerial, and restricted to issuing a warrant for the removal of the prisoner "to the district where the trial is to be had." Rev. St. 1014. This view of the powers and duties of the district judge in this class of cases, or of the powers and duties of the circuit or district court, when the prisoner is brought before it on *habeas corpus*, cannot be maintained. In the case of *In re Buell*, 3 Dillon, 116, the question was presented, under circumstances very similar to those of the case at the bar, to the circuit court for the eighth circuit. Buell was arrested and committed in Michigan for trial in the District of Columbia on an indictment, found in that district, charging him with having written a libel therein, which he afterwards published in Detroit. It was contended there, as here, that the question of the sufficiency of the indictment was for the court in which it was found, and not for the district judge on an application for the warrant of removal. On this Judge Dillon observes: "I cannot agree to the proposition in the breadth claimed for it in the present case. The provision devolves on a high judicial officer of the government a useful and important duty. In a country of such vast extent as ours, it is not a light matter to arrest a supposed offender, and, on the mere order of an inferior magistrate, remove him hundreds, it may be thousands, of miles for trial. The law wisely requires the previous sanction of the district judge to such removal. Mere technical defects in an indictment should not be regarded; but a district judge who should order the removal of a prisoner, when the only probable cause relied on or shown was an indictment, and that indictment failed to show an offence

against the United States, or showed an offence not committed or triable in the district to which the removal is sought, would misconceive his duty, and fail to protect the liberty of the citizen. It is the constitutional right of the citizen to be tried in the district in which the offence imputed to him is alleged to have been committed, and not elsewhere. Article 2, § 2."

The case of *In re Clark*, 2 Ben. 540, is not opposed to this view of the duty of the district judge in cases of this description. The prisoner was remanded, but the court advised that, upon such a proceeding, "the indictment must be held sufficient *unless it be so defective in the material averments that it would be the manifest duty of the court before which it was presented by the grand jury to decline to take action upon it.*" Independently of these authorities, I should have felt no hesitation in holding that, where a district judge is applied to for a warrant of removal, and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offence against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant. I proceed to consider whether the indictment in this case is so defective in material averments that it would be the manifest duty of the court to which it was presented to decline to take action upon it. The indictment alleges, in substance, that Thomas Doig, on the nineteenth of April, 1879, in the district of Oregon, and within the jurisdiction of the district court of the United States for the district of Oregon, was a pilot of steam vessels from and over the Columbia river bar and along the Columbia river to Astoria, in said district of Oregon. This is the only jurisdictional averment to be found in the indictment. The instrument then alleges that on the said nineteenth of April, 1879, the steamer Great Republic was "making a voyage from San Francisco, in the state of California, to Portland, in said district of Oregon, * * * and had on board then and there the said Thomas Doig as pilot, etc.; that said steamer, with said officers, etc., on board, arrived on her said voyage off the Columbia river bar, at or near the automatic buoy, at 12:32 A. M. of the nine-

teenth of April; that the master then and there delivered the vessel to Doig to be by him navigated, etc., as pilot as aforesaid, * * * over the said Columbia river bar and to Astoria, as aforesaid; that said Doig received the vessel, etc., into his exclusive charge as such pilot," etc.

The indictment further avers, in substance, that the night was too dark to admit of the vessel being safely navigated; that it was the duty of said Doig, as pilot as aforesaid, to detain the vessel outside the said bar until she could be navigated in safety; that he neglected his duty in that behalf, and that he then and there misconducted himself as such pilot, and negligently undertook then and there to take and navigate the said vessel in said darkness over the said Columbia river bar, and to Astoria aforesaid, and that by reason of his said misconduct, negligence, and inattention to his duty as pilot as aforesaid, he, the said Thomas Doig, as such pilot, ran the said vessel ashore on Sand island, in said Columbia river, and said vessel was then and there wrecked and lost, and the certain persons, whose names are to the jurors unknown, were by the said misconduct, etc., of said Thomas Doig, as pilot as aforesaid, then and there drowned; that by reason of said misconduct, etc., and the destruction of the lives of said officers, the said Doig became, and was, and is guilty of manslaughter, contrary to the form of the statutes, etc. The section of the Revised Statutes under which this indictment is drawn, is, so far as is material to this case, in substance as follows: "Every captain, engineer, pilot, * * * by whose misconduct, negligence, or inattention to his duties the life of any person is destroyed, * * * shall be deemed guilty of manslaughter."

It is not sufficient, under this statute, that the officer has been guilty of misconduct, negligence, and inattention to duty. Human life must have been destroyed. The destruction of life is the essence of the offence. Misconduct, however gross, is innocent under this section unless it be the cause of the manslaughter. It is evident, therefore, that the offender is guilty, not when the misconduct or negligence occurred, (it may be at the beginning of the voyage or trip of the steamer,)

but where that misconduct bore fruit by causing the death of a human being. The first clause of the indictment merely avers, as we have seen, that Thomas Doig, on the nineteenth of April, 1879, in the district of Oregon, and within the jurisdiction of the court, was a pilot, etc. It does not even allege that he was then engaged within the district, or within the jurisdiction of the court, in the performance of his duties as such pilot. It further avers that on the nineteenth of April, 1879, the Great Republic was "making a voyage from San Francisco to Portland," and that on that day she arrived off the Columbia river, at or near the automatic buoy; that Doig then and there took charge of her, and that by his misconduct she was wrecked on Sand island, where the loss of life by drowning occurred.

It is not alleged that the steamer was, at any time while Doig had charge of her, within the jurisdiction of the court. It is not averred that she was on the high seas, or that she was within the district. It is not averred that the automatic buoy, where the alleged misconduct commenced, is within the jurisdiction of the court, or within the district of Oregon; nor is either of these averments made with respect to Sand island, where the deaths by drowning occurred, and where the offence of manslaughter was committed. But this is not all. It affirmatively appears, from an examination of the statutes which define the northern boundary of Oregon, an inspection of the official charts of the coast survey, and the testimony of an expert who identifies the natural objects called for in the description of the boundary line contained in the statutes and laid down on the chart, that Sand island is not within the district of Oregon, but is within the boundaries of Washington territory. The offence is, therefore, not justiciable in the district of Oregon, and the United States courts of Oregon are without jurisdiction to try the offender. The analogy between this case and *In re Buell*, decided by Judge Dillon, is thus seen to be perfect. In that case, as in this, the indictment showed on its face that the offence was not committed within the jurisdiction of the court in which the indictment was found. The prisoner must be discharged.

UNITED STATES *v.* COPPERSMITH.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. **FELONY — COUNTERFEITING — PEREMPTORY CHALLENGES —** REV. ST. § 819.—Section 819 of the Revised Statutes provides that, “when the offence charged is treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges.” *Held*, that the offence of uttering and passing counterfeit coin was not a felony within the terms of this section.

Indictment for counterfeiting.

W. W. Murray, Dist. Att’y, and *J. B. Clough*, Ass’t Dist. Att’y, for the United States.

George Gantt, for defendant.

HAMMOND, D. J. The defendant, being on trial for counterfeiting the coin of the United States, has peremptorily challenged three of the jurors tendered to him, and claims the right to challenge another, and any number to the extent of 10, under section 819 of the Revised Statutes. He insists that the offence of making counterfeit coin is a *felony* at common law, and therefore a felony in the purview of that section; he also insists that being punishable by imprisonment at hard labor, which necessarily implies confinement in a penitentiary, it is a felony according to the ordinary acceptance of the term in American law; that congress used the term in that sense in this statute, and did not intend to indicate capital offences already provided for by the same section of the Revised Statutes.

Section 819, above referred to, is as follows: “When the offence charged is treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of *any other felony*, the defendant shall be entitled to ten and the United States to three peremptory challenges, and in all other cases, civil and

criminal, each party shall be entitled to three peremptory challenges," etc.

It is apparent that it was here intended to designate by the term "any other felony," other offences than *capital* offences, for they are otherwise specially provided for by this section.

Prior to legislation by congress this matter of peremptory challenges in the federal courts was in some confusion until the supreme court declared that they might, by rule, adopt the state practice. *U. S. v. Shackleford*, 18 How. 588; *U. S. v. Douglas*, 2 Blatchf. 207; *U. S. v. Reed*, Id. 435, 447, and note; *U. S. v. Cottingham*, Id. 470; *U. S. v. Tallman*, 10 Blatchf. 21; *U. S. v. Devlin*, 6 Blatchf. 71.

When we could resort to the state practice it was generally found that legislation had accurately regulated the right of challenge by distinctly classifying offences with such statutory definitions as left no room for doubt. But since congress has legislated we can no longer look to the state laws for guidance, nor to the common law, but only to the acts of congress themselves, which, unfortunately, have only increased the confusion by the use of an indefinite term. I am not advised of any reported case construing this section, nor of the practice in regard to it, except that it is said at the bar that heretofore in this district 10 challenges have not been allowed in any case where the offence charged was not, by the statute creating it, declared to be a felony. The first act of congress, passed March 3, 1865, (13 St. 500,) after providing for treason and capital offences, as is done by this section 819, provided that, "on the trial of any other offence *in which the right of peremptory challenge now exists*, the defendant shall be entitled to ten and the United States to two peremptory challenges." The criticism of Judge Conkling, in the fifth edition of his Treatise, page 632, on this act, demonstrates how indefinite were the terms used, and he concludes that the section was nugatory as to all crimes except treason and capital offences: because the right of peremptory challenge, he says, only exists in cases of *felony*, and now nothing is felony except *capital offences*. In this criticism the learned district judge of Oregon seems to concur, for he also declares the sec-

tion nugatory. *U. S. v. Randall*, 1 Deady, 524, 548. Yet, strange to say, the act of June 8, 1872, (17 St. 282,) substitutes this word *felony* for the phrase in the act of 1865 which was thus condemned, because it limited the right of peremptory challenges to cases of *felony*, and thereby left it impossible to determine under the act of 1865 to what cases it should apply. Perhaps a proper construction of the act of March 3, 1865, taken in connection with the law as it then stood under the decision in the case of *United States v. Shackelford*, *supra*, and the act of 1840, would have been to look to the *state practice* to determine in what cases the right of peremptory challenge "now exists," and to allow 10 challenges in all such cases; for the state practice then furnished not only the rule as to number, but the rule as to the kind of offence in which the right of peremptory challenge existed, as we have already seen. There would have been some certainty in this, but now there is no other course but to determine by the common law what congress meant in this section of the Revised Statutes by the words "*any other felony*." If congress uses a common-law term in defining a crime, or in any statute, we must look to the common law for a definition of the term used. 2 Abb. Pr. 171; Conk. Treatise, 178, (5th Ed.); *U. S. v. Palmer*, 3 Wheat. 610; *U. S. v. Wilson*, Baldw. 78, 93; *U. S. v. Barney*, 5 Blatchf. 294, 296; *U. S. v. Magill*, 1 Wash. 463. The Massachusetts Code commissioners, many years ago, in enumerating *felonies* within the provisions of their Code, in a note, add that the meaning "of the word '*felony*' (as by them defined) is limited to the use of the word in this Code, and is not to be confounded with the common-law signification of the same term, *whatever that meaning may be, for it is a matter of no little difficulty to settle it*." Report, title "Explanation of Terms Cited;" 1 Hale's P. C. (A. D. 1847) 575, note.

The supreme court of Alabama said, in *Harrison v. State*, 55 Ala. 239, 241, that it is not easy to determine in all cases what are *felonies* and *crimen falsi*. "To predicate of an act," says the supreme court of Ohio, "that it is *felonious*, is simply to assert a legal conclusion as to the quality of the act; and unless the act charged, *of itself*, imports a felony, it is not

made so by the application of this epithet. Indeed, the term *felony* has no distinct and well-defined meaning applicable to our system of criminal jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which at common law worked a forfeiture of goods and lands. But under our Criminal Code the word '*felonious*,' although occasionally used, expresses a signification no less vague and indefinite than the word '*criminal*.'" *Matthews v. State*, 4 Ohio St. 539, 542. In the constitution of Tennessee the words "*criminal charge*" are held to be synonymous with "*crimes*," which is said to mean, technically, "*felonious*" offences. *McGinnis v. State*, 9 Humph. 43.

The term "*felony*" appears to have been long used to signify the degree or class of crime committed, rather than the penal consequences of the forfeiture occasioned by the crime according to its original signification. 1 Archb. Cr. Pl. 1, note; 1 Russ. on Crimes, 43.

Capital punishment by no means enters into the true definition of felony. Strictly speaking, the term comprised every species of crime which occasioned at common law the total forfeiture of either lands or goods, or both. That was the only test. Felonies by common law are such as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, etc. 1 Hale's P. C. 411. These crimes were of such enormity that the *common law* punished them by forfeiture: (1) the offender's wife lost her dower; (2) his children became base and ignoble and his blood corrupted; (3) he forfeited his goods and chattels, lands and tenements. The superadded punishment was either capital or otherwise, according to the degree of guilt; that is, the turpitude of the offence. There were felonies not punishable with death, and on the other hand there were offences not felonies which were so punishable. However, the idea of felony was so generally connected with capital punishment, that, erroneously, it came to be understood that all crimes punishable

with death were felonies; and so, if a statute created a new offence and declared it a felony, but prescribed no punishment, by implication of law it was punishable with death. This has been changed by statute, and now, where a felony is created and no punishment prescribed, it is transportation for seven years, or imprisonment, with or without hard labor, not exceeding two years; and for a second felony, transportation for life. 7 and 8 Geo. IV. The punishment for a misdemeanor at common law was fine or imprisonment, or both, unlimited, but in the most aggravated cases seldom exceeding two years. Tomlin's Dict. title "Felony;" 4 Black. Com. 94; 3 Inst. 43; 4 Bacon's Abridg. title "Felony" and title "Forfeiture;" Viner's Abridg. title "Forfeiture;" 1 Hale's P. C. 411, 574; 1 Archb. Cr. Pr. 1, and note, and p. 185; 1 Russ. on Crimes, 42; 1 Bish. Cr. Law, §§ 580-590; *U. S. v. Williams*, 1 Cranch's C. C. 178; *Adams v. Barrett*, 5 Ga. 404, 412; *State v. Dewey*, 65 N. C. 572; *U. S. v. Smith*, 5 Wheat. 153, 159; *U. S. v. Staats*, 8 How. 41.

Tested by the common law, then, this term has no very exact and determinate meaning, and can apply to no cases in this country except treason, where limited forfeiture of estate is allowed. But technically that is a crime of a *higher* grade than felony, although it imports also felony. If it be conceded that capital punishment imports a felony, there can be none, *at common law*, except capital crimes. But that test is untechnical and founded in error. It does not always apply, and it is as arbitrary to say that a crime punished capitally is a felony, as it is to say that one punished by imprisonment in the penitentiary is a felony. Our ancestors brought with them the common-law gradations of crime, as they stood in their day, and although they organized a government which is wholly destitute of a criminal common law, its influence has always prevailed to produce incongruities arising out of an attempt, even when creating new offences, unknown to any law except our own peculiar system, to keep up its gradations of crime. The supreme court, in the case last cited, points out the distinction between the use of the word "felony" as descriptive of an offence, and as descriptive

of the punishment; pronounces it the merest technicality, and holds that where a statute creates an offence and declares it a felony it is not necessary to plead a felonious intent. Bouv. Dict. "Feloniously." The court also speaks of "the *moral degradation* attaching to the punishment actually inflicted," and intimates that it is about all that is left to us of the common-law idea of felony. There is just as much of moral degradation in an offence called by the statute-makers a misdemeanor, if punished degradingly, as if with the same character of punishment they call it a *felony*.

In American law, forfeiture as a consequence of crime being generally abolished, the word "felony" has lost its original and characteristic meaning, and it is rather used to denote any high crime punishable by death or imprisonment. Burrill's Dict. title "Felony." The term is so interwoven with our criminal law that it should have a definition applicable to its present use; and this notion of moral degradation by confinement in the penitentiary has grown into a general understanding that it constitutes any offence a felony, just as, at common law, the idea of capital punishment became inseparably connected with that of felony. There is, therefore, much force in the suggestion of counsel that since we cannot define this word, as used in this statute, by the common law, it must be understood that congress used it in this modern sense. Because, where the words of a statute construed technically would be inoperative, but construed according to their common signification would have a reasonable operation, the courts do sometimes adopt the latter construction. Yet it will be found that this modern idea of felony has come into general use by force of state legislation on the subject, so far as it is legally established. From a very early day, and as a necessity, the state legislatures have passed laws defining and enumerating felonies as those crimes punishable by confinement in the penitentiary; and this has come to be the law in nearly every state. In Tennessee the law of 1829 elaborately enumerates felonies, and punishes them with hard labor in the jail or penitentiary, and the act of 1873, chapter 57, makes all crimes, punishable by confine-

ment in the penitentiary, felonies, and so defines the term. C. & N. 316; Acts 1873, p. 87. We have no such legislation by congress. Section 5391 of the Revised Statutes is limited to offences committed in places ceded to the United States, and adopts the state law as to such offences if not otherwise provided for; and of course, in such cases, if the offence is a felony by state law, it becomes a felony by this section.

There is no uniformity in the legislation of congress as to the punishment of criminal offences, and we often find statutory misdemeanors punished more severely than statutory felonies; and while some of the statutes prescribe hard labor as a part of the punishment, when necessarily the confinement must be in some prison where it can be so enforced, on the other hand the simple imprisonment prescribed may become confinement with hard labor by selecting a prison where it is a part of the discipline; so that we often find prisoners convicted of the same offence, and sentenced to the same punishment, undergoing in fact different punishments. *Ex parte Karstendick*, 93 U. S. 396. In this case it is held that it is not the intention of our statutes to limit confinement in the penitentiary to those offences where hard labor is imposed. Rev. St. § 5539. We find it, therefore, impracticable to apply any such test as that prescribed by the state legislation above mentioned, as the legislation of congress now stands, to the determination of the meaning of the word "felony" as used in section 819 now under consideration.

But, aside from this, nothing is better settled than that we cannot look to the state laws, in the criminal jurisprudence of the United states, for the characteristic elements which go to make up an offence, and enter into it as a part of its legal status; nor to the common law; nor even to the character of the punishment. The federal courts take no cognizance of state statutes in criminal proceedings, and deduce no criminal jurisdiction from the common law, which has no force, directly or indirectly, to make an act an offence not made so by congress; though in all matters respecting the accusation and trial of offenders, not otherwise provided for, we are

referred to the laws and usages of the state when the judicial system was organized. 1 Abb. Pr. 197; 2 Abb. Pr. 171; *U. S. v. Reid*, 12 How. 361; *U. S. v. Lancaster*, 2 McLean, 431; *U. S. v. Peterson*, 1 Wood. & M. 306, 309; *U. S. v. Shepherd*, 1 Hughes, 520, 522; *U. S. v. Taylor*, Id. 514, 517; *U. S. v. Maxwell*, 3 Dill. 275, 276; *U. S. v. Shepard*, 1 Abb. 431; *U. S. v. Cross*, 1 McArth. 149; *U. S. v. Black*, 1 Sow. 211; *U. S. v. Ebert*, 1 Cent. L. J. 205; *U. S. v. Williams*, 1 Cliff. 5; *U. S. v. Barney*, 5 Blatchf. 294; *U. S. v. Watkins*, 3 Cr. C. C. 441, 451; *U. S. v. Hammond*, 2 Woods, 197; *U. S. v. Magill*, 1 Wash. C. C. 463.

In those cases where the state laws have been adopted as in section 5391 of the Revised Statutes, they stand as if the act of congress had defined the offences in the very words of the state law; and in those cases where congress has been content to denounce the offence by its common-law name, as in murder and rape, for example, (Rev. St. 5339, 5354,) they stand as if congress had re-enacted the common law *totidem verbis*. And in such cases, unquestionably, if the crime be a felony at common law or by state statute, it is a felony under the act of congress; and if not punished *capitally* would fall within the designation of "any other felony," as used in this section 819, by force, not of the common law or state statute, but of the federal statute. Murder is a felony at common law, but it may be doubted if rape is, it having been made so by statute. Merton, 2; 1 Hale's P. C. 226. If this latter offence were not punished capitally, and we were confined, as in some of the states, to the *ancient* common law, and not that existing at the time of the revolution, it would become a very difficult matter to determine how it was to be ruled under this section 819. This is mentioned to illustrate the almost inextricable perplexity which arises from the use of this word "felony" in the present state of our law, in acts of congress, without some statutory definition of it. It does not follow, however, because we can find no common-law definition of this term which will give it and this statute operation according to that law, and are forbidden to adopt the definition found in the modern use of it in state statutes, that this

clause of the section is nugatory. The authorities cited show that congress has the undoubted power to create felonies by legislation operating within the limitations of its jurisdiction over crimes, and that from time immemorial legislatures having general jurisdiction over criminal offences have added felonies to the common-law list. *U. S. v. Tynen*, 11 Wall. 88. Statutes create felonies either by declaring offences to be felonies in express terms, or impliedly, as in the ancient statutes, by enacting that the defendant should have judgment of life and member where the word "felony" is omitted, or where the statute says an act under particular circumstances shall be deemed to have been feloniously committed. 1 Arch. Cr. Pr. 1, and note; 1 Russ. on Crimes, 43; and authorities above cited. Now, where the common law operates, this declaration, express or implied, entailed the consequences of forfeiture, and if the statute fixed no punishment there was superadded by the ancient law the penalty of death, and now in England transportation, and in our American states confinement in the penitentiary. But it is manifest that the jurisprudence of the United States, as long as section 5326 of the Revised Statutes and other prohibitions of forfeiture of estate and corruption of blood as a punishment for crime continues to be the law, and as long as congress adopts no general legislation punishing felonies as such, either capitally or otherwise, the declaration that an offence shall be a felony in an act of congress is merely *brutum fulmen*, except so far as it inclines the legislative mind to affix a more severe penalty for the commission of the offence. Notwithstanding this, however, it has been, until recent years, the constant habit of congress to declare offences created by it either felonies or misdemeanors in express terms, or to leave them to be misdemeanors by making no declaration on the subject. There is no doubt that offences are felonies when so declared to be, and the accused is entitled in such cases, where not punished capitally, to 10 challenges under this section 819, and this is about the only substantive effect such a declaration has, unless it be that it further gives the accused the right to be proceeded against only by indictment under the

fifth amendment to the constitution; though it has been judicially declared that under our system a felony is not an infamous crime in the sense of that amendment. *U. S. v. Cross, supra*, and the other authorities above cited. It would seem, therefore, that it is rather to the advantage than the disadvantage of the offender to have congress declare his offence a felony. Be this as it may, the clause under consideration may operate, in other than capital cases, to give the defendant 10 challenges in the following classes of cases: *First*, where the defence is declared by statute, expressly or impliedly, to be a felony; *second*, where congress does not define an offence, but simply punishes it by its common-law name, and at common law it is a felony; *third*, where congress adopts a state law as to an offence, and under such law it is a felony.

It only remains to be determined whether the offence charged in this indictment comes within either of these categories. Making counterfeit coin was by the ancient common law treason, and subsequently a felony, while uttering or passing it was only a misdemeanor. *Fox v. Ohio*, 5 How. 410, 433; Tomlin's Dict. title "Coin;" 1 Hale's P. C. 210, 224; *U. S. v. M'Carthy*, 4 Cranch's C. C. 304; *U. S. v. Shepherd*, 1 Hughes, 521. The act of 1790 (1 St. 115) declares counterfeiting the public securities a felony, and punished it with death. The act of 1825 reduced the punishment to hard labor not exceeding 10 years. 4 St. 119. The act of 1806, the first to protect the coin, declared counterfeiting a felony punishable by imprisonment at hard labor. 2 St. 404. The act of 1825 declared counterfeiting the coin a felony punishable with imprisonment at hard labor not exceeding 10 years. 4 St. 121. The act of 1873 declared counterfeiting treasury notes a felony, as did the acts of 1847 and 1861. 9 St. 120; 12 St. 123; 17 St. 434. Counterfeiting postage stamps was declared felony by the acts of 1851 and 1853. 9 St. 589; 10 St. 256. Counterfeiting three-cent pieces was by the act of 1865 made a misdemeanor. 13 St. 518.

The Revised Statutes drop this classification, as does the act of 1877, and these offences are no longer declared felo-

nies. Rev. St. 5414, 5457, 5464; 19 St. 223. And this demonstrates that the legislative will no longer declares this offence a felony, and we think the felony feature is impliedly repealed. It is argued very earnestly, however, that the effect of this is only to leave it a felony as at common law. We have already shown that under our system there is no common-law felony unless congress merely defines a crime which is a felony at common law by its common-law name. If the act said "counterfeiting" shall be punished as prescribed, it would be a felony; but it does not say so; it defines the offence for itself, and does not declare it a felony for the obvious reason that such a declaration would not change the character of the crime or the punishment, and would be wholly useless. Besides, it would be absurd to punish the misdemeanors of uttering and passing counterfeit coin with precisely the same punishment, all defined in the same section, and then say it was the intention of congress to give a defendant charged with making the counterfeit ten challenges, and another defendant who passed it only three, while both offences are defined and punished by the same section and with the same punishment. There is no substantial reason for such a distinction. One crime is just as heinous as the other in the sense of this statute, and are upon an equal footing.

It is ruled that the defendant can have but three challenges.

In re MARTIN, Bankrupt.

(District Court, W. D. Pennsylvania. October 18, 1880.)

1. **MECHANIC'S LIEN — COMPUTATION OF TIME.** — In computing the six months within which a mechanic's lien can be filed, under the statutes of Pennsylvania, (Purd. Dig. 1034, pla. 44, 46,) either the day on which the last work is done, or the day on which the claim is filed, must be excluded.

Sur exceptions to the report of the commissioner distributing proceeds of real estate.

———, for plaintiff.

———, for defendant.

ACHESON, D. J. I have carefully read and considered the testimony in this case and briefs of counsel submitted to me, and am of opinion that the commissioner was right in his finding that the last work by Dyer Loomis, the mechanics' lien creditor, upon the bankrupt's building, under the original contract, was done on October 5, 1874. It is true, the raising of the party wall seven feet above what was called for by that contract was for the accommodation of Chambers, the adjoining owner and builder, and was in pursuance of an independent contract between him and the bankrupt. But the raising of that wall merely postponed the work of topping out the chimneys on the party wall until it was carried up the additional height. By the clear preponderance of the evidence it appears that on October 5, 1874, the chimneys were topped out, and also some filling in, or chinking, done under the frieze. This work was certainly necessary to complete the original contract, for without it the bankrupt's house would have been unfinished.

But, as the claim was not filed until April 5, 1875, it is strenuously contended that the lien was lost. To this, however, I cannot assent. By section 14 of the mechanics' lien law of June 16, 1836, (Purd. 1033, pl. 44,) the lien remains "until the expiration of six months after the work shall have been finished or materials furnished, although no claim shall have been filed therefor; but such lien shall not continue longer than the said period of six months, unless a claim be filed as aforesaid, at or before the expiration of the same period." The phraseology of the act of April 14, 1855, (Purd. 1034, pl. 46,) is somewhat different, but manifestly it made no change in the law in respect to the time for filing the claim. Its purpose was merely to link together the items of an account where there was no contract for the whole, or no order which would embrace the whole within a single undertaking. *Diller v. Burger*, 68 Pa. St. 432. Clearly, in computing the six months under these two recited acts, either the day on which the last work is done, or the day on
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which the claim is filed, must be excluded. Therefore, the claim here, filed April 5, 1875, was in time.

This construction of the mechanics' lien law is in accord with all the later authorities upon the vexed question of the computation of time. *Cromelien v. Brink*, 29 Pa. St. 524. Thus it was decided in *Green's Appeal*, 6 W. & S. 327, that under the act of the twenty-sixth of March, 1827, the five years from the day of the entry of a judgment within which it must be revived by *scire facias*, are exclusive of the day on which the judgment was entered. And in *Menges v. Frick*, 73 Pa. St. 137, it was held that where a debt was due October 6, 1862, suit brought October 6, 1868, was in time to escape the bar of the statute of limitations. "Time is to be computed excluding the day on which the act is done from which the count is made," is the rule as expressed in *Brisben v. Wilson*, 60 Pa. St. 452.

As respects credits, it seems to me the commissioner has made all proper allowances, and correctly reports the balance due on this lien.

And now, October 18, 1880, the exceptions to the commissioner's report are overruled, and said report, and the distribution therein made, confirmed absolutely.

VOYLES, Assignee, v. PARKER.

(Circuit Court, D. Indiana. —, 1880.)

1. BANKRUPTCY — JUDGMENT — LIEN — ADMINISTRATOR'S BOND — ILLINOIS STATUTES. — Under the statutes of Illinois an assignment in bankruptcy does not defeat the lien of a judgment recovered against the bankrupt upon an administrator's bond, where the suit upon the bond was instituted prior to the filing of the petition in bankruptcy, although the judgment was not obtained until after such petition had been filed.

In re Joslyn, 2 Biss., explained.

———, for plaintiff.

———, for defendant.

DRUMMOND, C. J. The facts which give rise to the controversy in this case may be very briefly stated. Thomas J. Rod-

man, bankrupt, as the administrator of an estate, had given a bond under the law of this state for the faithful performance of his duties as such administrator. On the twenty-seventh day of April, 1876, a suit was brought in the state court upon the bond. Under the law of this state such a bond is given to the state, and the suit was instituted in its name. A judgment was recovered in the suit, which seems to have been for the benefit of the defendant in this case, Andrew J. Parker. Rodman, who executed the bond, became a bankrupt by a petition filed on the sixth of June, 1876, and an assignment was made under the bankrupt law of his property to the assignee, which, of course, related back to the time the petition in bankruptcy was filed. Judgment was not recovered in the suit on the bond against the bankrupt until after the petition in bankruptcy was filed, and the question in the case is whether the assignee is entitled to the property, or the parties interested in the bond of the administrator. It is claimed on the part of the assignee that the assignment cut off by relation, on the 6th of June, when the petition was filed, and before judgment on the administration bond was rendered, the lien which the judgment gave on the property of the bankrupt. The law of this state declares that in suits instituted by the state upon bonds given to the state, that the liens upon judgments shall relate back to the time of the institution of the suit; and the judgment which was rendered in the state court declared that in conformity with the law the lien should relate back to the twenty-seventh of April, 1876, when the suit was commenced. If the lien operated from that time upon the property, of course it cut off any claims which the assignee might have, because a petition in bankruptcy was not filed until after a suit on the bond was commenced. That is the controversy between the parties.

I think that I must hold, under the law, that the priority of right is on the part of the creditors under the administrator's bond, and not on the part of the assignee. The bankrupt law was not intended to destroy any liens created by the state law. It is true that it was quite within the bounds of possibility that, although the suit was commenced

on the 27th of April, no judgment might have been entered upon the bond, or might not be entered finally for an indefinite time; still, under the law of this state, when the suit was commenced on such instrument, an inchoate lien had taken effect on all the property of the bankrupt within the jurisdiction of the court, and whenever judgment was finally entered it operated by relation to the time when the suit was commenced. The liens of judgments depend very much, in fact, I may say exclusively, in a case at law, upon the particular legislation of each state. In some of the states we know that a lien of a judgment operates from the first day of the term when the judgment is rendered. In some states it operates from the last day of the term when the judgment is rendered. In other states it operates from the time the judgment is rendered, irrespective of the first and last days of the term. In this case there is an express statute upon the subject, and, as I understand, the supreme court of this state has held that administrator's bonds are within the terms of this law, and that a lien upon such a judgment relates back to the time the suit was commenced. Then there was an inchoate lien on the 27th day of April, on the property of the bankrupt, which became consummated by relation when the judgment was rendered, and it cut off, therefore, any claim which the assignee might have on the bankrupt's property which related back to a time subsequent to that of the commencement of the suit. It is insisted with a great deal of force, on the part of counsel, that it has been decided in *In re Joslyn*, 2 Biss. 235, that the lien of a landlord, which he acquires by virtue of a distress warrant, is similar to that acquired by this judgment creditor, and that the same principle which operates upon a lien of attachment and destroys it, also operates upon the lien of the judgment. That case was decided under the peculiar legislation of Illinois in relation to proceedings by landlords to enforce their rights against tenants. It required that when a distress warrant should issue and seize the property, that there should be a suit, or an inquiry by the court, as to the amount due; and what was found due was in the nature of a judgment, on which execution could issue against

the property. This court held that within the spirit of the bankrupt law that must be considered subject to the same rules and regulations and principles as cases of attachment against the bankrupt's property, and that it should, just as in that case, dissolve and put an end to the attachment or lien of the landlord: *provided*, between the day of the issue, and the levy on the distress warrant, and the time of the judgment and execution issued under the orders of the court, the petition in bankruptcy was filed. I still adhere to the view which I took in that case, as to the effect of the peculiar legislation of Illinois in relation to the enforcement of the rights of landlords against their tenants; and, as was stated in that case, I think it was not strictly within the letter of the bankrupt law, but within its general scope and spirit. In this case it can hardly be said that the same principle applies. Here is an express provision of law, which declares that the judgment on an administrator's bond shall be a lien from the very day of the commencement of the suit. It was undoubtedly competent for the state to enact such a law, and the bankrupt law, as I think, preserved the lien which the law of the state thus created, and it is the duty of the federal court to sustain it.

Without going at greater length into the considerations which operate upon the mind of the court, I shall affirm the judgment of the district court.

BROADNAX v. THE CENTRAL STOCK YARD & TRANSIT COMPANY.

(Circuit Court, D. New Jersey. September 28, 1880.)

1. RE-ISSUED LETTERS PATENT No. 5,925, dated June 23, 1874, for improvement in apparatus for rendering lard and tallow and other animal matter, and for crisping and drying the refuse thereof, *held*, under the circumstances of this case, not infringed by the defendant corporation.
2. SAME—INVENTION.—The gist of the invention is the apparatus, or combination of parts, and not any particular instrumentality by which it is put into operation.
Seymour v. Marsh 2 O. G. 675.
Wheeler v. The Clipper Mower Co. Id. 442.
3. SAME—SAME—RE-ISSUE—CLAIM.—A re-issue is not therefore void which first claims the instrumentality by which the combination or apparatus may be used.
4. SAME—SAME—CONSTRUCTION.—An invention need not in fact be constructed, in order to preserve a patent, when the patentee is a citizen of the United States, and the invention is capable of construction and operation from the model and specifications filed in the patent-office.
Wheeler v. The Clipper Mower Co., supra.

In Equity.

Amos Broadnax, for complainant.

Leon Abbot, for defendant.

NIXON, D. J. The bill is filed in this case against the defendant corporation for infringing re-issued letters patent, No. 5,925, dated June 23, 1874, for improvement in apparatus for rendering lard and tallow and other animal matter, and for crisping and drying the refuse thereof. The original letters patent, numbered 81,473, were granted to the complainant September 1, 1868. The bill of complaint alleges that the first claim of the re-issue has been infringed. This claim is for a stationary tank enclosed in a stationary heating chamber, and fitted with a horizontal rotating stirrer, by which the material under treatment is thrown over and over while it is being rendered or dried.

The principal defences insisted upon at the hearing were—*First*, that the re-issued patent was void, (a) because the re-issue embraced more than the original patent; (b) because

the alleged invention was not new; and (c) because it was useless and inoperative. *Second*, that the devices used by the defendants did not infringe.

If either defence prevail there must be a decree for the defendants. What is the complainant's patent? It has reference to mechanism or a combination of ingredients for the separation of grease or tallow from animal tissue or fiber. Two modes have long been in use for accomplishing this result—one by steam and hot water, where the rough fat or offal is put into a tank or kettle, and steam is injected in a sufficient quantity and temperature to liquify the fat; and the other by the application of dry external heat to the vessel containing the tissue or fiber, whereby the fat is melted and then drawn off in various ways. One is known as the wet and the other as the dry rendering. Two of the defendant's expert witnesses, Quimby and Reilly, agree that the former process is so much more efficient than the latter, in separating the fat from the animal fiber, that the residuum obtained requires a different treatment to prepare it for use. The elimination of the grease or tallow is so much more complete, that it is only necessary to evaporate the surplus water to have the residual mass fit for commercial purposes; whereas, by the dry process, so much of the fat still adheres to the fiber that loss would ensue unless independent mechanical treatment is resorted to, by pressure or squeezing, to remove the adhering fat before the scraps or cracklings are prepared for fertilizers.

The complainant has sought to remedy the practical inconvenience and expense resulting from the need of these separate processes for rendering and drying, by claiming in his re-issue such a combination of a heating chamber, tank, and stirrer that the material is rendered and the refuse dried in one continuous process in the same apparatus.

In the original letters patent, the patentee, in stating the history of the art, describes both methods and suggests the principal objection to each. The object of his invention was to remedy these defects by furnishing a combination of instrumentalities, all of which were old, but claimed to be new in

their combination and results. He does not pretend that the combination has, *in itself*, any capacity to produce any useful result, and nowhere therein does he indicate that it may be used except in connection with external dry heat. But, in the re-issue, he states broadly that his invention extends to whatever form the apparatus, in its various forms, may take, or in whatever form the heat may be applied, or however the furnace may be combined with the apparatus.

The counsel for the defendant, at the hearing, insisted that this was an enlargement of the scope of the patent; that more was claimed than was suggested in the original; and that hence the re-issue was void, not being for the same invention.

I do not think the re-issue is obnoxious to such a charge. In view of the state of the art, an apparatus for rendering the fat and drying the refuse of animal matter is patentable, apart from any connection with other instrumentalities by which it is to be made operative and efficient. Because one mode only is indicated in the original, the patentee is not shut up to the one mode in the re-issue, as long as it is not of the essence of the invention. The law, indeed, requires him to disclose some mode by which it can be rendered practically useful, but it does not follow that he is confined to that, and may use no other. The gist of the invention is the apparatus, or combination of parts, and not any particular instrumentality by which it is put in operation. *Seymour v. Marsh*, 2 O. G. 675; *Wheeler v. The Clipper Mower Co.* Id. 442. It may be proper also, in this connection, to allude to another ground of opposition to the complainant's patent, urged by the defendant in the argument.

The proof was that the complainant had never put his alleged invention into practical use, and it was insisted from this fact that the inventor could not maintain a suit for its infringement. But this is not the law, when the patentee is a citizen of the United States. In *Wheeler v. The Clipper Mower Co.*, *supra*, Judge Woodruff, in considering this objection to the validity of a patent, says: "If the invention be such that when the thing invented shall be constructed

according to the model and specifications filed, it will operate successfully, as a practical and useful thing, the inventor has satisfied the law, and his patent is valid. He is not bound by law to construct it, in order to preserve his patent."

In our investigation into the design and aim of the patent we are favored with the testimony of the patentee himself, who is also complainant in the case, and who ought to be a competent authority on the question of what the inventor intended to embrace. He says, at folio 552 of the record, that "the essential principle of my [his] invention consists of a tank enclosed in a hot chamber, by which the heat can be kept in the material without danger of burning it, and of an instrument introduced into the tank by which the material can be continually stirred or agitated in such manner as to continually present new particles of the material under treatment to the drying surface of the tank, and to the free heat contained in the tank."

Accepting this as an accurate description of the complainant's patent, the remaining questions are: (1) does the defendant corporation infringe the combination? and (2,) if they are infringers, is the combination of the complainant new? The defendants disclose, in their answer and by their testimony, the mechanism which they employ in rendering the fat and drying the refuse. They allege that upright boilers are used in one portion of their factory, separate and apart from the place where the scraps or residuum are dried. "In these boilers," it is further stated, "the animal matter is placed, and steam is injected therein in the ordinary way until the lard or tallow is boiled out. The lard or tallow is then drawn off from above the water contained in the boiler through any ordinary stop-cock in the side of the boiler. The water is then drawn off, and the refuse animal matter is dumped into a tank underneath, from which it is taken and put into an ordinary screw-press, for the purpose of expelling the excess of water. The scrap or residuum is then taken to another part of the factory and placed in an ordinary horizontal steam-jacketed boiler. In this boiler there is a horizontal shaft with radial arms. The steam is then let into the

jacket of the boiler and the shaft is turned. The result of the operation is that the animal matter is reduced to a fine, dry powder of almost pure animal fiber. The powder is free from odor, and is used as an article of commerce, and, by reason of the great percentage of nitrogen it contains, and by reason of the absence of oleaginous matter from it, it is fitted for immediate use in the manufacture of fertilizers."

The witness Quimby says, (fol. 1128): "Exactly what is done by the defendants is fully and correctly stated in their answer to this suit, which I have read." He further testifies that the defendant's rendering is exclusively by the wet process, in a number of upright boilers, substantially like the rendering tank described in the patent re-issued to Ebenezer Nilson, May 7, 1850; that when the tallow is all rendered the scrap is removed from the boilers, and, after the excess of water is pressed out of it, is carried to another part of the premises and deposited in a number of horizontal steam-jacketed stationary cylinders, in which it is dried by the action of revolving arms; that the rendering and drying are thus two distinct operations, and are not conducted as parts of one process in the same apparatus, but are separately conducted in two different kinds of apparatus, respectively situated in two different parts of their premises. It is in carrying on this second stage of the process, to-wit, in drying the scrap after the rendering and pressure, that the complainant considers his patent to be infringed. He regards the horizontal steam-jacketed stationary cylinders, containing a horizontal shaft with radial arms, as equivalents for the constituents of the combination described in the first claim of his re-issued patent.

Whether he is correct in this depends upon whether a liberal or narrow construction is given to his claim. Any construction broad enough to constitute the defendants infringers, it seems to me, would render his patent void, for lacking the essential qualities of usefulness and novelty. After a careful consideration of what is fairly embraced in the patents granted respectively to John C. Appenzeller, on the 25th of January, 1859, (defendant's Exhibit G;) and to Matthew

Hodkinson, on the 29th of November, 1859, (defendant's Exhibit J;) and to Eston, Jr., and Thiry, on the 27th of February, 1866, (defendant's Exhibit M,)—it is difficult to hold that what the defendant uses infringes the complainant's patent, without at the same time reaching the conclusion that these several patents are anticipations of the claimant's claim. I find in them the stationary tank, the heating chamber, and the horizontal rotary stirrer in such juxtaposition, and bearing such relations to each other, that it is quite as easy to say that the complainant's patent infringes them, as to affirm that the defendants' infringe the complainant's. Recognizing the fact that a limited construction may be given to the patent, which will allow it to stand, I will not say that it is void for want of novelty; but there must be a decree in favor of the defendants, on the ground that they do not infringe.

Let a decree be entered dismissing the complainant's bill, with costs.

NAT. CAR-BRAKE SHOE Co. v. L. S. & M. S. RY. Co.

NAT. CAR-BRAKE SHOE Co. v. THE I. C. R. Co.

(Circuit Court, N. D. Illinois. October 11, 1880.)

1. PATENT No. 40,156—SECOND CLAIM—INFRINGEMENT.—The second claim of patent No. 40,156, issued October 6, 1863, to James Bing, for an improvement in car-brake shoes for railway cars, *held*, infringed under the circumstances of this case.
2. INVENTION—CONSTRUCTION.—[In construing an invention, effect must be given to the whole of the description contained in the specification and claims.
3. SAME—SAME.—A patent contained two claims—*First*, for a certain "lateral rocking motion" of the one part of a combination upon that of the other; *second*, for such combination with certain additional elements, "the whole being constructed and arranged substantially as specified." *Held*, that such second claim could be infringed by a machine not containing such "lateral rocking motion," where such motion was not, in terms, referred to by the said claim.

In Equity.

Banning & Banning, for complainant.

George Payson, for defendant.

DRUMMOND, C. J. These two cases depend mainly upon the construction which is to be given to plaintiff's patent of October 6, 1863. The counsel for the respective parties differ as to this construction. According to the view of the plaintiff's counsel, the patent should receive a liberal or enlarged construction, speaking of it in one sense. According to the view of the defendant's counsel, the construction should be more narrow. The original patentee was James Bing. No controversy is made as to the title of the plaintiff to the patent. The patent is for an improved shoe for car brakes, constructed in two parts, a model of which I hold in my hand. That part which rubs against the periphery of the wheel of the car, and produces the retarding motion, is called the sole. The other part is called the shoe. Now, in considering his invention, we must give effect to the *whole* of the description contained in the specification and claims. The patentee starts out with declaring that his invention is—*First*, the construction of the two parts of the shoe, in the peculiar manner which is described, so that the part in contact with the wheel can accommodate itself to the same. He goes on to describe that the periphery of a car-wheel is bevelled, and that the object of his peculiar construction of the shoe and the sole is that the part which comes in contact with the periphery of the wheel may accommodate itself to the wheel. He claims that his invention consists, *secondly*, in a peculiar *combination* of the two parts of the shoe, the clevis by which the shoe is suspended to the truck, and the bolt which secures the clevis to the shoe, and the two parts of the shoe to each other. Then he describes the shoe by giving in detail the manner in which the parts are constructed, and their relations to each other, and to the periphery of the wheel; and then he describes the peculiar manner in which the wheels of the car are constructed and beveled. One of the main things connected with the construction of these two parts, is that the shoe has two lugs which pass outside of a lug, *a*, of the sole, and a bolt fastens them together. There is also a lug, *d*, in

the sole, which fits into a sort of mortise or opening in the shoe, so as to enable the oscillating or vibratory motion, which he speaks of, to take place. After describing the difficulties which exist in fitting the shoe to the periphery of the wheel, he says: "These difficulties are avoided by my invention, inasmuch as the sole, B, is permitted to have a lateral rocking motion on the shoe, and can at once accommodate itself to the bevel of the wheel, or to any variation caused in that bevel by the lateral movement of the axle." Then he says: "Another improvement in my invention is the peculiarly simple arrangement of the clevis which supports the shoe; the bolt, G, serving the purpose of connecting the clevis to the shoe, and the latter to the sole."

It seems as though the patentee, in thus describing his invention, intends two things: in the first place, to describe the construction and sole in such a way that the latter is accommodated to the ordinary bevelled periphery of the wheel; and, secondly, he intends to describe a combination of these various parts, consisting of the shoe and the sole, the clevis by which the shoe is suspended to the truck, and the bolt which secures the clevis to the shoe, and the two parts of the shoe to each other. This appears to have been the intention of the patentee, and the claims seem to carry out that intention. There are two claims. The first is: "The shoe, A, and sole, B, both being constructed and adapted to each other substantially as described, *so that the sole can have a lateral rocking movement on the shoe*, for the purpose specified." There can be no doubt what was in the mind of the patentee in making the first claim. If we take out the bolt, the rocking motion can be seen in the model by moving the two (the shoe and the sole) one upon the other. And to accomplish that the bolt is somewhat loose, and one of the lugs of the sole, *a*, has to be tapered more or less, as he describes it. The question is whether there is necessarily found in the second claim, as an essential part of it, without which it does not exist as a valid claim and there can be no infringement, this construction of parts which produce the rocking motion. This claim is: "The combination of shoe, A, sole, B, clevis, D,

and bolt, G, the whole being constructed and arranged substantially as specified." It will be observed, the words are "*constructed and arranged.*"

I am inclined to think there may be an infringement, and this may be a valid claim, independent of what is set forth in the specifications, as he describes the invention, "firstly," and in the first claim, without its possessing the rocking motion; and, therefore, that the view which the plaintiff's counsel take of the construction of the patent is correct. I have already called attention to the manner in which the inventor divides his invention into two parts—*First*, so that the sole can accomodate itself to the periphery of the wheel; and, *secondly*, the peculiar combination of the two parts of the shoe, the clevis by which the shoe is suspended upon the truck, and the bolt which secures the clevis to the shoe, and the two parts to each other; and also to that part of the specification in which he says that the difficulties which have heretofore existed are avoided because of the shoe having this lateral rocking motion. He then says his invention or device has *another improvement*, and that consists in what he describes "*secondly*" as his invention, in the first part of his specification: the peculiarly simple arrangement of the clevis which supports the shoe; the bolt, G, serving the purpose of connecting the clevis with the shoe, and the latter to the sole. Whether or not the combination of the second claim contains, as an essential element, this lateral rocking motion, in order to make it a valid claim, and whether it must be found in an infringing machine, is the question. If this rocking motion was all that was in the mind of the inventor, I think it may be asked, with a good deal of significance, what was the necessity of his dividing his inventions into two parts, as he did in his specification, and also in the claims. He may have had in his mind that the device which he was describing was constructed in the way which he has specified; but still he claims a combination, which he describes in his second claim, and I think it may be a valid combination, independent of the lateral rocking motion, which he speaks of in the first claim, and in various parts of the specification. If it is not so, then

all that would be necessary to prevent infringement would be to change slightly the form of the lug, *a*, of the sole, or to tighten the bolt, *G*. I do not understand that in the various patents that have been put in evidence there is anything which successfully attacks the device invented by the patentee, and which would prevent it from taking effect as the subject of a valid patent. It is true, before this invention there were devices by which the two parts of the shoe were separated, when that which was applied to the periphery of the wheel was worn out, or so worn that it could be no longer successfully used; but, after all, that is not the invention of the patentee in this case. His invention is the peculiar construction of the shoe in these two parts, put together and separated in the way described. And while it may be the duty of the court to limit the patentee strictly to the claims which he has set forth, still, it is also the duty of the court to give effect to the invention of the patentee, provided the court can see that he has described and claimed it, and so I think the second claim may be infringed, although there may not be in an infringing machine the lateral rocking motion described in the first claim.

With this construction of the patent, it seems to me there cannot be much doubt but that the devices of the defendants, in both cases, infringe the plaintiff's patent. The variations are not substantial, but are more in form than in substance. So that, on the whole, I find that the plaintiff is entitled to a decree in each case.

NAT. CAR-BRAKE SHOE CO. v. D., L. & N. R. Co.

(Circuit Court, E. D. Michigan. ———, 1880.)

1. PATENT No. 40,156, issued October 6, 1863, to James Bing, for an improvement in car-brake shoes for railway cars, *held*, not infringed under the circumstances of this case.
2. SAME—INFRINGEMENT—EVIDENCE.—Where a device was not intended as an evasion of a patent, but was intended for an entirely different purpose, and the infringement, if any, was purely accidental, the evidence of such infringement must be so clear as to admit of no other reasonable construction.

———, for complainant.

———, for defendant.

BROWN, D. J. This is a bill in equity for the alleged infringement by the defendant of patent No. 40,156, issued October 6, 1863, to James Bing, for an improvement in car-brake shoes for railway cars. The case was submitted upon the pleadings and stipulation of the parties as to the facts.

The validity of the patent is, for the purposes of this suit, admitted, but the defendant denies the infringement, and this is the only issue in the case. It seems that in the construction of car-wheels the tires or peripheries are slightly bevelled outward from the flanges, in order to secure a slight outward pressure upon the rails and to relieve the flanges of some portion of the strain put upon them in holding the wheels upon the track; and that in stopping the cars it is desirable that the brakes should be bevelled in an opposite direction, to correspond and fit closely to the bevel of the wheels, although this is not always done.

Various patents, English and American, were introduced by the defendant, to exhibit the state of the art prior to the issue of complainant's patent. It appears from them that car brakes were originally constructed in a single piece, attached to the end of a beam running across the car. This method of construction, however, was open to the objection, that when that portion of the shoe (technically called the sole) applied to the flanges was worn out, the whole shoe

became worthless. To remedy this, a separate iron sole was provided and bolted to a piece of wood known as the shoe, and attached to the end of the beam. When the sole became worn it could then be unbolted, taken off, and reversed, or discarded, and a new sole be attached to the shoe without injury to the latter. One of these devices, taken from the Michigan Central Railroad, was introduced as an exhibit under the name of the "Michigan Central Railroad Shoe."

Plaintiff's invention was a new departure. In stating the nature of his improvement he says: "My invention relates to the construction of shoes or rubbers for car-wheels, and consists—*Firstly*, in constructing the shoe of two parts, in the peculiar manner described hereafter, so that the part in contact with the wheel can accommodate itself to the same.

* * * Even when the usual shoes are properly fitted to the bevelled peripheries of the wheels the lateral movement of the axles, as the wheels traverse curves of the track, is such that ordinary shoes cannot fit accurately at all times. Another evil attending the use of ordinary shoes or rubbers is that as the lateral movement of axles takes place an undue strain is imparted to the brake-beam. These difficulties are avoided by my invention, inasmuch as the sole, B, is permitted to have a lateral rocking motion on the shoe, and can at once accommodate itself to the bevel of the wheel, or to any variation caused in that bevel by the lateral movement of the axle."

His improvement, in brief, consists in having the sole loosely fitted to the shoe, so that, when pressed against the periphery of the wheel, the sole accommodates itself to the bevel of the wheel, however much or little it may be. The claims of the patent are stated as follows: *Firstly*, the shoe, A, and the sole, B, both being constructed and adapted to each other substantially as described, so that the sole can have a lateral rocking movement on the shoe for the purpose specified; *secondly*, the combination of the shoe, A, sole, B, clevis, D, and bolt, G, the whole being constructed and arranged substantially as specified.

The device of the defendant, undoubtedly, resembles this in v.4,no.3—15

some particulars. It contains a bolt and a clevis, by which the sole is attached to the shoe, and is made removable simply by withdrawing the bolt, as in plaintiff's invention. It is quite obvious, however, that it was not intended as an infringement or evasion of the plaintiff's patent, and that the object of the device was to render the sole reversible, so that when worn upon one side it could be taken off the shoe and turned upside down.

Whether it be an infringement of the plaintiff's first claim depends upon two questions: *First*. Does the sole have a lateral rocking movement on the shoe for the purpose specified, viz., to accomodate itself to the bevel of the wheel? *Second*. If this result is produced, is it produced by means used by the plaintiff, or by a mechanical equivalent thereto?

Whether the defendant's device has the lateral rocking movement must be determined as a question of fact, and by an actual inspection of the devices, one of which, as well as a model, is made an exhibit in the case. The model certainly contains no possibility of such a rocking movement. The sole is firmly attached to the shoe—as firmly as if it were bolted to it, as in the Michigan Central exhibit. Plaintiff, however, claims that this is not a fair representation of the shoe used by the defendant. On an examination of the iron shoe actually employed upon the defendant's cars, I am satisfied that if there be any rocking movement at all it is due to a slightly imperfect construction, or to wear, and that in either case it does not sufficiently answer the purpose of the plaintiff's patent. In a case of this kind, where it is obvious defendant's device was invented for an entirely different purpose, and was not intended as an evasion of the plaintiff's patent, the infringement, if any exists, being purely accidental, it seems to me the evidence of actual infringement should be so clear as to admit of no other reasonable construction. If, upon the other hand, I were satisfied that an evasion was attempted, I should be disposed to resolve any doubts I might have upon the question of infringement or mechanical equivalents as favorably as possible for the complainant.

It is true that when defendant's shoe is hung loosely by the clevis it has a rocking movement like that of the plaintiff's, but when pressed forcibly against the wheel the sole accommodates itself to the shoe and not to the periphery of the wheel, and consequently no rocking movement is produced; or, if there be any at all, it is so slight as to have no perceptible effect. The fact that the sole of the defendant's shoe is worn principally upon one side, is strong evidence to show that it has not accommodated itself to the bevel of the wheel. Nor am I satisfied that, conceding that defendant's shoe has a lateral rocking motion, it is produced by the means employed by the plaintiff or by a mechanical equivalent thereto. It is useless to set forth here at length the difference between the two devices, as no description we could give would be comprehended without an actual inspection of the models. The principal distinction between the two is that in the plaintiff's patent the sole is attached to the shoe only at one end by a bolt passing through a lug of the sole and two corresponding lugs of the shoe, the clevis by which the shoe is supported being attached to this bolt. The other end of the sole is not attached to the shoe at all, but has a pyramidal projection, fitting into a corresponding socket in the sole, by which the latter is prevented from escaping entirely, and the lateral motion is produced. In defendant's device the sole contains a lug at either end fitting to two corresponding lugs in the shoe, and is fastened at one end by a bolt and at the other by a clevis. I am not satisfied that one is the mechanical equivalent of the other.

As this finding disposes of both of plaintiff's claims, an order will be entered dismissing the bill.

MACDONALD *v.* SHEPARD and others.

(Circuit Court, D. Massachusetts. October 15, 1880.)

1. PATENT No. 155,534, dated September 29, 1874, claiming, as a new article of manufacture, a skirt protector for ladies' dresses, having a fluted or plaited border, bound with or composed of enamelled cloth, or other water-proof material, sustained.
2. SAME—INFRINGEMENT—EVIDENCE.—The proof of infringement in this case held sufficient, in the absence of contradiction.

In Equity.

*Complainant, pro se, and Benj. F. Butler, for complainant.
E. N. Dickerson and J. S. Holmes, for defendants.*

LOWELL, C. J. The plaintiff's patent, No. 155,534, dated September 29, 1874, claims, as a new article of manufacture, a skirt protector for ladies' dresses, having a fluted or plaited border, bound with or composed of enamelled cloth, or other water-proof material. As originally granted, it was for a skirt "facing or protector," but the facing was disclaimed in November, 1874. The records of the interference case with one Chase, and of the case in this court before my predecessor, are made part of this record.

In the interference, (6 O. G. 359,) the commissioner decided in favor of the patentee, and said, among other things: "Macdonald made this invention in 1861, and between that time and 1865 she attached water-proof skirt protectors to four of her own dresses. Short dresses became fashionable in 1865, and therefore nothing more was done with this invention until the year 1872, when long dresses were again the style, and Macdonald then commenced experimenting, preparatory to filing an application for a patent."

He afterwards says that an attempt has been made in argument to confound skirt facings with skirt protectors. "These articles," he rejoins, "are entirely distinct in form, and are used for a different purpose. Enamelled cloth has been used for the former, but there is nothing in the record to show that it has been used for protectors." He then refers to the patent of Lucinda Humphrey, and finds that oil-cloth,

which is described by her, could not be used for a protector operating like plaintiff's; and, as to Mackey's patent, he says it is for a facing which only extends to the edge of the skirt, and that braid is the protector to Mackey's skirt. He then considers the plea of abandonment and decides against it.

The grounds, then, upon which the patent was granted were, an invention earlier than Chase's, namely, in 1861; that it had not been abandoned; and that it was not anticipated by a skirt "facing" which extended only to the bottom of the dress and was bound in with it by a piece of braid.

It is, undoubtedly, true that the discrimination between a protector and a facing had not been made in common speech at the time of this decision. Facings are protectors, in a broad sense, and they were called so before protectors, in the sense of the patent and disclaimer, had come into use. The commissioner found that enamelled cloth was used for facings of skirts before Miss Macdonald made her invention. He might have added that they were called "protectors;" but since strips of water-proof material have been used to hang below the skirt and braid to protect both, the name is more generally applied, as the office applied it, to this latter article.

Judge Shepley's decision agrees entirely with that of Mr. Leggett, though whether he had the latter opinion before him I do not know. In *Macdonald v. Blackmar*, 9 O. G. 746, he says: "I see no reason to doubt that she (Miss Macdonald) was the first and original inventor of this article, as distinguished from a skirt facing, which is an entirely different article, and from a skirt protector, which, being made of wigan or similar material, was substantially useless for the purpose as compared with the complainant's invention."

Judge Blatchford has found, upon a preliminary hearing by affidavits, that the date fixed by the commissioner for the plaintiff's invention was rightly fixed. He also agrees with me that the invention includes a plain as well as a fluted or plaited form of water-proof skirt protector. 18 O. G. 193. This is a somewhat nice question of construction, but I still think it the better opinion.

The evidence in this case brings out very clearly that

enamelled cloth was used for protecting skirts a long time ago, and perhaps before 1861; but it is not proved to my satisfaction that it was used as a protector in the present sense. I think it was probably made into facings. The evidence of the witnesses who sold it is not, and could not well be, very distinct upon this point, as they were none of them women or dress-makers. This case does not vary substantially from the facts proved or taken for granted before the commissioner and before the late circuit judge, unless the evidence of the complainant herself in cross-examination will have that effect.

The complainant, in her anxiety to prove that the Morrison "protector," which was a strip of enamelled cloth, sold for the purpose of protecting skirts, was used as a facing, and not as a protector in the more recent sense, has sworn that enamelled cloth of that sort would not be useful as a protector, because it would show its white or non-enamelled side below the dress, and because its edge would fray, and that this was the only enamelled cloth to be had in the market in 1861 and long after. "If this be so," say the defendants, in substance, "how can you maintain that you invented this thing by the use of such cloth in 1861?" I think the answer to this argument is that the plaintiff has always insisted that her use of the invention before 1865 was experimental. So strongly was this put by her in the *Blackmar Case*, that the defendants argued that she had experimented without success, and had abandoned her supposed invention. Judge Shepley found, as the commissioners had found, that there was no abandonment. Of course, if the invention was put into public use in 1861, the patent is void; but this point was not taken before the commissioner or before Judge Shepley. The patentee's account of it is that she took some pains to correct the defects of the old enamelled cloth, but did not fully reach a satisfactory result until she had some cloth specially prepared for her after she had, as the commissioner says, resumed her experiments in 1872.

It is always ground for suspicion and scrutiny that a patentee with one breath carries back his invention, and with the next declares it to have been so incomplete that his use

was only experimental. This is what the plaintiff does, and what the office and Judge Shepley appear to decide that she is entitled to do. I am not prepared to dissent from this conclusion.

The only evidence of infringement is from the plaintiff herself, who produces a strip of water-proof cloth with a strip of India rubber sewed to its lower edge, which she swears is exactly what she has seen sold by the defendants, as and for skirt protectors. This appears to me a sufficient proof of infringement in the absence of contradiction.

Decree for the complainant.

TILLMORE v. MOORE, Owner, and another.

(District Court, D. Maryland. November 8, 1880.)

1. LIBEL—PARENT—ABDUCTION OF SON.—A parent may maintain a libel in admiralty for the wrongful abduction and carrying to sea of a son.
2. TORT—MASTER—SHIP-OWNER.—A ship-owner is liable for such tort of the master, where the master is in command of the vessel as the agent of the owner.
3. ABDUCTION—DAMAGES.—*Held*, under the circumstances of this case, that the owner of the ship was not liable, but that the master was answerable in the sum of \$150 to the mother of the minor for the abduction of her son.

In Admiralty. Libel *in personam*.

Applegarth & Hagner, for libellant.

I. A. L. McClure, for respondents.

MORRIS, D. J. This is a cause of damage brought by the libellant against the owner and master of the schooner Thomas W. Moore, for damages for the abduction and ill-treatment of her son, Henry Johnson, a youth of about 16 years of age.

The libel alleges that libellant is the only surviving parent of her said son, and entitled to his services and wages, and to have care and custody of him; that about September 26,

1879, her son was shipped on board said schooner, (then employed in dredging for oysters in the Chesapeake bay,) without her knowledge or consent, and detained in said employment until the eighth of March following; that her son was, during that time, exposed to the rigor of a severe winter, endured great hardships, was frequently beaten and cruelly treated by said master, and allowed to suffer for want of proper food and medicines, and that when discharged he was badly frost-bitten and sick, and is still disabled from work; that, in consequence, libellant was put to expense for his cure and medical treatment, and is still deprived of his earnings, and is advised that he will never completely recover his ability to labor.

The libellant is a colored woman, living in Washington, and the proof shows that her son, when shipped on respondent's vessel, was about 16 years of age, and was living with his mother, and gave to her whatever he earned at any work he could get to do. It appears that he, together with several other colored boys, were induced by a colored man in Washington to leave their homes and come with him to Baltimore, and were there taken by him to the office of a man who procures seamen for oyster vessels, where, the respondent Lewis being present, they signed shipping articles to serve Lewis during the oyster season at seven dollars per month on any vessel he should designate. They received seven dollars apiece advance, which was taken by the man who shipped them, and then they went at once aboard the schooner Thomas W. Moore and proceeded down the bay on her, the respondent Lewis being master in command. Lewis employed the schooner in connection with two other oyster vessels on the Chesapeake, each taking its turn to bring the whole catch of oysters to Baltimore, and the other two remaining to continue dredging. Johnson, the libellant's son, was transferred from one of these three boats to another during the whole oyster season, and did not get back to Baltimore for some five months after he was shipped. He then at once returned to his mother in Washington. She had known nothing of his intention to leave his home, and, having been unable to learn

anything about him, had suffered great anxiety, and had given him up for dead. His feet and hands were badly frost-bitten, and he had a severe cold. His mother was obliged to nurse him and have a physician attend him for about two months, and at the time of the hearing (September, 1880,) he had not entirely recovered his strength, and was somewhat crippled in his feet.

That a parent may maintain a libel in admiralty for the wrongful abduction of his son and carrying him to sea is well settled; and also that for such a tort committed by the master the ship-owner would be liable as well as the master, if the master was in command of the vessel as his agent; but where the master is owner *pro hac vice*, and not commanding the vessel as agent for the owners, they are not in such cases held personally liable for his torts.

I find that in this case the master had the possession, control, and management of the vessel, and was to man and victual her. He paid, as hire to the owner, a proportion of her gross earnings, but the owner had no control over her employment. So they both testify, and that the owner's share of the vessel's earnings were usually deposited for him by the master with a merchant in Baltimore, and that for months at a time he knew nothing of the vessel's whereabouts, and that he knew nothing of the shipping of this boy. I think, therefore, that, as against the owner, the libel must be dismissed.

I come, then, to consider the merits of the case against Captain Lewis, the master. Looking at all the testimony in the light most favorable to him, and giving him the benefit wherever there is any conflict of testimony, there is no doubt in my mind that he is shown to have knowingly committed a wrong against the libellant, for which he must respond in damages.

The boy, Johnson, claims that he stated in Captain Lewis' presence, in the shipping office, that he was under 21 years of age. Captain Lewis denies this, and swears that the first he knew of it was when Johnson told him he was under age after he had been two days on board, and that Johnson then

said that the men who shipped him persuaded him to say he was 21, and told him he would get more wages if he would say so.

I think that in this Captain Lewis has told the truth, and I am not all disposed to think he would have taken the boy if he had said, in the shipping office, that he was only 16; but, conceding this to be so, and also that there was nothing in the boy's appearance that should have suggested inquiry, by his own admission he had notice of this boy's age two days after they sailed. Johnson says that at that time he told the captain how he had run away from home, and that he wanted to write to his mother and to return to her. The captain could not have at once returned him; but the testimony shows that at least every two weeks one of these three vessels, which were oystering together, came up to Baltimore.

The captain not only did not return him, but kept him for five months, requiring him to work, first on one boat and then on another, at labor of the hardest kind, subject to great exposure, during all the winter months. He paid no attention to the request of the boy to be allowed to return home. He made no inquiry to see if his statements were true, and he allowed the mother to remain in ignorance with regard to her son, and a prey to prolonged anxiety.

Continuous service on an oyster vessel in the Chesapeake, during the winter months, involves labor and exposure which hardy adults are none too able to endure, and no contract requiring it should be made except with those who fully comprehend what they are undertaking. To keep such a youth as Johnson, unused to exposure and hard labor, for five months in such service, was to risk his health and his ability during the rest of his life to earn his living by labor. I throw out of consideration all Johnson's allegations of constant beatings and of insufficient food. His testimony in these matters is not supported by any other witness and is contradicted by several. He had never before been on a vessel, and I have no doubt that his natural slowness and want of familiarity with the duties expected of him brought upon him

some rough treatment, which he has exaggerated, and in this action, except for wrongs the consequence of which have resulted in pecuniary loss to the mother, no recovery can be had. The testimony of the libellant and the physician who treated Johnson establish that he returned home badly crippled with frost-bitten feet and hands, and suffering the effects of a very severe cold, all the result of exposure, and that he required careful nursing and treatment for two months, and six months afterwards, at the time of the hearing, was not entirely well. It also appears that of the seven dollars a month he was to receive the seven dollars advance went to the men who procured him for shipment, and nearly all the balance was retained by the master to pay for the necessary clothing supplied to him during the winter, so that when he was discharged there was coming to him in money only \$3.75. He brought none home with him.

The pecuniary loss to the mother has been the expense and labor she has been put to in curing her son of the sickness brought on by his exposure, and the loss of his earnings and services consequent upon his abduction and subsequent disabilities.

As all the parties concerned are in very humble circumstances, it is not my purpose to award any large sum as damages. A large sum would more than compensate the mother for actual pecuniary loss, and would probably be ruinous to the respondent. Under all the circumstances I think \$150 the proper sum to be allowed.

MERCHANTS' STEAM-SHIP CO. OF CHARLESTON, SOUTH CAROLINA, v. THE SCHOONER S. C. TRYON.

(District Court, D. Maryland. —, 1880.)

1. COLLISION — SCHOONER AND STEAMER — EVIDENCE CONFLICTING — SCHOONER HELD IN FAULT.

In Admiralty.

John H. Thomas, for libellants.

Brown & Smith, for respondents.

MORRIS, D. J. The case for the steamer, as stated in the libel, is that she left the port of Baltimore on the afternoon of the eighth November, 1879, with eight passengers and a full cargo of merchandise, on one of her regular voyages from Baltimore to Charleston, South Carolina; that about 9:45 P. M., the night being starlight, with a slight haze on the water, the wind a seven-knot breeze from the southward, the steamer going on her course S. by E. one-half E. down the Chesapeake bay, at nine miles an hour, having all her regulation lights burning, and her second mate, with an experienced seaman, in the pilot-house, and two lookouts in the bow, when, about eight miles above Cove Point, one of the lookouts reported a *red* light one and one-half points over the steamer's *port* bow; that the second mate and the man at the wheel satisfied themselves that the light was on a sail vessel about one and one-half miles off, coming up the bay with a fair wind, and *ported* the helm of the steamer so that she fell off about one point and a half; that when the said vessels were within 300 or 400 yards from each other, and were sufficiently apart not to justify any apprehension of danger, the schooner being still on the steamer's port bow, and showing only her *red* light, the schooner suddenly, and without cause, starboarded her helm and showed both her lights; that the steamer's helm was then put *hard* a-port, and her engines stopped, but said vessels were so near together that the schooner struck the steamer amidship on her port side, cutting her to the water's edge, and doing her such damage that she sank in

about 10 minutes in water some six fathoms deep; that the passengers, officers, and crew of the steamer escaped in the small boats, and got aboard of the schooner, and were brought to Baltimore.

The answer of the claimants of the schooner S. C. Tryon alleges that the schooner was coming up the bay on the starboard tack, making six knots an hour, with the wind from southward and eastward, her course being N. by W. one-half W., her master in charge of the deck, a lookout in the bow, and a man at the wheel; that the lookout reported the steamer's mast head light about five miles off, and from a half a point to a point on the schooner's *starboard* bow; that a few minutes after this light was reported the *red* light of a sailing vessel was discovered directly *astern* of the schooner, and 150 yards distant, gaining rapidly on the schooner, so that a collision seemed imminent, unless the schooner fell off and gave the sailing vessel room to pass; that the schooner did fall off for a few seconds, going about 40 feet from the line of her original course, and then resumed her course of N. by W. one-half W.; that the steamer, which afterwards turned out to be the Falcon, continued to bear *one* point on the schooner's *starboard* bow, and was about three miles distant when the schooner resumed her course; that about five minutes later, the steamer's *red and green* lights being then visible, the master of the schooner exhibited to the steamer a *lighted torch*; that the steamer kept her course, continuing to bear one point on the schooner's *starboard* bow, until she got very near to the schooner, when all at once the steamer ported her helm and started across the course of the schooner; that as soon as the steamer made this attempt a collision became inevitable, and for the purpose of easing the blow, and preventing the steamer from running over the schooner, the helm of the schooner was put "hard down," causing the schooner to go to *starboard*, and the order had hardly been executed when the vessels came together, the port bow of the schooner striking the steamer's *port* side, at an angle of about 50 degrees, between the stern of the steamer and the stern of the schooner.

It is obvious that the statements contained in the libel and in the answer are in direct conflict and are utterly irreconcilable. The steamer's case is that the schooner was approaching her on the *port* bow, exhibiting her *red* light. The schooner alleges that she was approaching the steamer on the *starboard* bow, exhibiting her *green* light. The steamer claims to have been going to *starboard* to get further away from the schooner's *red* light. The schooner claims that she was already on the *starboard* side of the steamer, and that the steamer, by going to *starboard*, went across her bows and brought about the collision. There was no excuse for any mistake, as the night was starlight, and clear enough to see lights at the distance of five miles, and these two vessels had been approaching nearly head on, and profess to have been observing each other's lights for at least a quarter of an hour.

After examining most patiently the testimony of all the witnesses on board the colliding vessels, I have not found in the statements of those who testify for either side anything *in itself* indicative of an intention not to tell the truth. The navigation of both vessels would seem to have been in the hands of experienced and faithful men, and it has been with great reluctance that I have found that a decision of this controversy must discredit witnesses on one side or the other.

There were on the steamer, during the whole time the vessels were approaching each other, at least one lookout on duty in the bow, and part of the time two. In the pilot-house there was the second mate, who had nothing to do but to watch the navigation of the ship, and a wheelsman, whose sole duty it was to attend to the steering. So that there were at least three men on the steamer attending to duties not at all difficult for men of their experience to perform, and who could hardly, without the grossest obtuseness, have all escaped seeing the lights of the schooner. That the *red* light of some vessel on the steamer's port bow was reported several minutes before the collision is confirmed, if Captain Kirby's testimony is to be believed. He was sitting in his room adjoining the pilot-house, smoking. He heard the mate answer "Aye, aye, I see it;" heard him give the order "Port a little."

He heard the wheel move, and then the order "Steady;" and some minutes later he heard the mate say, "Confound that fellow, he has altered his course," and give the order "Hard a-port." Hearing that, he says he jumped up and went into the pilot-house, and saw the schooner very near and heading for the steamer at an angle of about 45 degrees on her port bow.

Then, if we look at the schooner, we find that there were on the deck of the *schooner* the *master*, the *lookout*, and the *wheelman*, all of them (judging from the testimony) experienced mariners, and all of them attending to their respective duties. Their testimony supports, in every particular, the allegations of the answer, and is, so far as I can see, consistent with itself and to all appearance worthy of credit. They asseverate that the steamer was never on their port side, but, from the time she was first seen by them until just prior to the collision, continued steadily about a point on the schooner's starboard bow, showing all the time both her lights. It did, upon first impression, seem to me impossible that to the schooner, which was moving *six* miles an hour, a *steamer*, which was moving *nine* miles an hour, could continue for 15 or 20 minutes to show *both* her lights a point over the schooner's port bow; but, without better information, however, than I now have of such matters, I am not prepared to find that the fact that the steamer was porting her helm and all the time altering her course more or less to starboard, might not have produced that result.

There are, however, some few facts developed by the testimony of persons not on either of the colliding vessels, which, after careful consideration, have brought me to a decision of the questions I am required to pass upon.

The answer alleged, and the master of the schooner and her crew more circumstantially stated, that there was from the first sighting of the steamer another sailing vessel about 150 yards astern, off the schooner's starboard quarter; and one theory of the claimants is that it was the light of this vessel that those on the steamer were observing; that, by reason of their negligent lookout, those on the steamer never

saw either of the lights of the schooner, nor the torch which she exhibited, and that it was not until in the effort to avoid this other sailing vessel, which was to the eastward of the schooner Tryon, and whose *red* light the steamer *did* see, that the steamer brought her head so much over to the westward that she crossed the schooner's bow and then for the first time saw her lights, and supposed that the other vessel had changed her course and that the lights were on her. This theory was not without some support from the facts and probabilities of the case, and tended to reconcile many of the conflicts in the testimony of the opposing witnesses.

After, however, much of the testimony on both sides had been taken, that other sailing vessel was discovered, and she turned out to be an oyster pungy, called the Patterson & Bash. And the testimony of her master and mate was then offered by the libellants. Their testimony is that of persons who actually saw the collision, and who had a fair opportunity of observing much that led to it; persons, too, who have no interest in this controversy, and who are strangers to the parties interested in it. It is testimony, therefore, I think, which in a case of such conflict is entitled to weight, so far as it is intelligently given, and so far tends to prove facts which may have been within the knowledge of the witnesses.

The master of the Patterson & Bash states that he was coming up the bay to Baltimore with a load of oysters, and that, as his was a small boat, he got nearly astern of the schooner Tryon, and kept her all the time about a half a point to the westward on his port bow, as a guide to steer his boat by, and as a protection to him from approaching steamers; that he saw the steamer's lights—*first*, her mast-head light, and afterwards her side lights also, and that the steamer bore as did the schooner, about half a point on his port bow; that at the distance of about a mile the steamer shut in her *green* light and showed only her *red* light, indicating that she had gone to westward; that he maintained his position with regard to the schooner, keeping her about 200 yards distant and about half a point over his port bow, until the schooner got to be some 200 or 300 yards from the steamer,

when both he and the mate testify that they observed the schooner go off to the westward, and he then said to the mate there would be a collision. He says he was near enough to hear the order given on the schooner, "Hard down! Hard down!" repeated twice, and immediately afterwards he heard the crash of the collision.

Both master and mate testify that for some time prior to the collision they had seen only the *red* light of the steamer, and such was their nearness to the schooner that they undertake to say that the *schooner could not possibly have seen the steamer's green light*. They testify that for a little while before the collision the schooner bore off to the westward, and that without that change in her course she would have gone two or three hundred yards clear to the eastward of the steamer. Some of this testimony consists of mere deductions and inferences of the witnesses, and is to be received with great caution; but in part it is a statement of facts which must be accepted as true, and the inferences are mostly such as, I think, necessarily result from the facts.

It must be accepted as a fact that the master and mate of the Patterson & Bash first saw both of the lights of the steamer, and then to them her green light disappeared and they saw only her *red* light, and continued to see only the *red* light up to the time of the collision. This agrees exactly with the changes in the steamer's course testified to by those on board of her.

Next, it must be admitted that the Patterson & Bash was close to the schooner; the master of the schooner says about 150 yards off, and the master and mate of the Patterson & Bash say never over a quarter of a mile off. From the testimony of the master and mate of the Patterson & Bash it appears that they kept the schooner nearly in a line between their boat and the steamer, so that I am brought to the conclusion that the lights of the steamer must have appeared to those on the schooner almost identically as they did to those on the Patterson & Bash. The proximity of the Patterson & Bash to the schooner at the time of the collision is confirmed

by the fact that, with the wind blowing strongly and directly away from them, those on the Patterson & Bash heard the order given by the master on the schooner.

It is to be noticed, too, that the judgment of the master of the Patterson & Bash, as to the effect of the alleged change of course of the schooner in causing the collision, is not a judgment made up after the event, but, unless he swears falsely, was what he at the moment expressed to the mate as soon as he observed the change of course, and before he heard the crash of the collision, and when he could hardly have been mistaken as to the relative positions of the vessels.

The production of the testimony from on board the Patterson & Bash gives rise to another significant consideration. Those on board of her had been sailing near to the schooner for an hour or more, keeping nearly under her stern and using her as a guide to steady their course by, yet they say nothing of the torch-light, which, it is said, was exhibited on the schooner. It is hardly possible that if it was exhibited they should not have seen it. A torch is not like a fixed light, which must be looked for to be discovered, but it is a blaze which illumines the deck and sails of the vessel exhibiting it, and makes a glare that it hardly seems possible that any one within a mile, or two could fail to take notice of, and which certainly would have been seen by persons on a vessel a little astern and not over a quarter of a mile distant. Evidence was introduced by the claimants for the purpose of showing that the wheelsman of the steamer was not a temperate man, and that he had been drinking when he went on duty at 8 o'clock.

This testimony was not very convincing, and the fact has been strenuously denied, and the charge receives no corroboration from the actions of the wheelsman as the other testimony discloses them. He had been an hour and three-quarters on duty at the time of the collision, under the immediate supervision of the captain and second mate, (the captain having been in the pilot-house until some 10 minutes before the collision,) and, if the wheelsman had failed to understand and execute the orders given him, or to have kept the steamer steady on her course, it would have been quickly detected, and

it is not to be believed that they would have permitted him to remain on duty if such had been his condition.

The whole theory of the respondents' case is, not that the steamer failed to execute through bad steering some maneuver which her officers attempted to make, but that she failed to see the lights of the schooner at all until in the act of crossing her bows. This would have been a fault with which the *wheelman* would have had nothing to do.

Evidence was also introduced for the purpose of discrediting one of the steamer's lookouts by showing that he was in the forecabin at the time he stated he was on duty and observed the change in the schooner's course; but this is the one of the lookouts who, it was admitted, was liable to be called off for other duties, and was not the one on whom rested the responsibility of uninterrupted attention, and, in the consideration of the case, I have excluded his evidence. Even if it be true that he attempted to swear to facts which he did not observe, I do not think it has been shown that the other witnesses for the steamer were aware of it. It was argued that the steamer's lookout was insufficient because they never saw or reported the lights of the Patterson & Bash. This, I think, is fully accounted for by the fact that the Patterson & Bash being in a line with the schooner and astern of her, her lights would have been hid by the schooner's sails, which were all boomed out. All the steamer's witnesses speak of a vessel which passed to the eastward just after the collision, when they were in the small boats, and which they tried to hail, and it seems probable this was the Patterson & Bash.

Although this case is one of great conflict of testimony, and in which I have had unusual difficulty, the conclusion to which I have finally arrived is that the preponderance of evidence and probability is in favor of the libellants, and that the decree must be in their favor.

GREENMAN and others v. THE STEAM-BOAT NARRAGANSETT.

(District Court, S. D. New York. ———, 1880.)

1. COLLISION — STEAMER LEAVING SLIP — NINETEENTH ADMIRALTY RULE.—The steam-boat City Point, having the steamer Narragansett in full view on her starboard hand, and being 900 feet from the slip within which the steamer was slowly moving out, and their courses crossing so as to involve danger of collision, was signalled by the steamer, after having previously sounded her starting whistle. *Held*, under these circumstances, that the nineteenth rule was clearly applicable, and that the City Point was bound to keep out of the way of the Narragansett.

The Propeller John Taylor, 6 Ben. 227.

4. SAME—EAST RIVER—NEGLIGENCE—RATE OF SPEED.—It is imprudent and reckless navigation for a steamer to run at the rate of not less than nine miles an hour at the distance of about 276 feet from the piers of the East river situated on the New York shore.
3. RATE OF SPEED—STATUTE.—A statute imposing a penalty for running along the piers of the East river at a speed exceeding 10 miles an hour, does not necessarily render a less rate of speed prudent.

T. E. Stillman, for libellant.

W. R. Beebe, for claimants.

CHOATE, D. J. This is a suit brought by the owners of the steam-boat City Point to recover damages sustained by her through collision with the Narragansett in the Hudson river, off pier 33, at about a quarter past 5 o'clock in the afternoon, on the twenty-sixth day of June, 1877. The City Point was a side-wheel steam-boat about 204 feet in length. She was then running as an excursion boat between the city and the fishing banks, and was on her return trip. Having landed passengers at pier 2, she was proceeding up the river on her way to her next landing at the foot of Tenth street.

The Narragansett was a large side-wheel steamer running between New York and Stonington, and, at the time of the collision, had started on her regular trip for Stonington from her berth on the south side of pier 33, heavily loaded with freight and with a large number of passengers. Her length was about 253 feet. She came straight out from her slip

into the river, and, when her stern was a few feet clear of the end of the pier, her bow came in contact with the starboard side of the City Point, a little forward of her wheel-house. She was very nearly if not quite stationary in the water at the instant of the collision, while the City Point was running at her full speed, about 10 miles an hour. The effect of the collision was that the guard and deck of the City Point were broken from forward of the paddle-box to the after gangway. The face of the wheel-house was carried away, and her shaft was displaced and her machinery entirely disabled. The libellants claim damages to the amount of \$17,000.

The Narragansett was injured by having her stem knocked to starboard. Otherwise she sustained no damage. The place of the collision is fixed with a considerable degree of certainty by its being a little more than the Narragansett's length out from the pier, and also by the fact that the donkey boiler which fell from the City Point was found to be 276 feet out from the end of the pier. The evidence also shows that the City Point was coming up the river at about that distance from the outer line of the piers. She put her wheel hard a-starboard almost immediately before the collision, but not long enough before materially to affect her distance out into the river. As she struck the Narragansett she put her wheel to port. This movement and the headway she still retained carried her into pier 36, where she made fast.

The libel alleges that while the City Point was proceeding up the river her master saw, on his starboard bow, the Narragansett lying on the south side of pier 33, and when the City Point was about opposite pier 30 the Narragansett gave one long blast of her steam-whistle, indicating that she was about to leave her pier, to which whistle the City Point instantly responded by giving two short and distinct blasts of her steam-whistle, a signal to the Narragansett not to attempt to cross the course of the City Point; that the Narragansett did not answer the two blasts of the steam-whistle of the City Point, but, very shortly thereafter, put her wheels in motion and started forward to leave her slip on a course

crossing that of the City Point, and involving risk of collision; that, in spite of the precautions taken by the City Point, the Narragansett struck the City Point with her stem about amidships; that the collision was caused by the negligence and improper conduct of those on the Narragansett in not having a good and sufficient lookout, in leaving their pier at the time and on the course they did, in not keeping on the starboard side of and out of the way of the City Point and in not stopping and backing in time to avoid the collision, and was not caused by any fault or omission of those on board the City Point.

The answer denies all fault on the part of the Narragansett, and charges that the collision was caused entirely "by the gross mismanagement of those on the City Point; that she was not in her proper course, but was passing unnecessarily and too close to the docks, and but about the length of the Narragansett from the mouth of the Narragansett's slip; that the Narragansett was about to leave her dock when a long blast of her steam-whistle was sounded to indicate that she was about to leave her pier; to that long blast no response was given by any vessel or steam-boat; that thereupon her engines were started and she commenced to move slowly out into the river; as her bow emerged from the slip, the City Point, which had been previously hidden from the sight of those on the Narragansett by the sheds on the piers on the southerly side of her slip, was discovered hugging the piers on the New York side and then about abreast of pier 28, bound up; that immediately the Narragansett blew one whistle to indicate to the City Point that she, the Narragansett, would cross the bow of the City Point, to which signal the City Point, although she then had the Narragansett on her starboard hand, and should have given way and kept out of the Narragansett's way, responded with two whistles indicating that she, the City Point, would hold her course and cross the bows of the Narragansett; immediately a second and single whistle was blown by the Narragansett, and her engines were reversed at full speed, although she was then but

partly without her slip, and had it not been for the careless and wilful mismanagement of the City Point the collision might then have been avoided; the City Point was not stopped, but kept right on at a rapid rate of speed, nor did she sheer off, but kept on a straight course, and came into collision with the bows of the Narragansett after she, the Narragansett, had stopped headway and was moving astern; that the collision was caused by the fault of the City Point in being too close to the line of the piers, instead of being out further towards the middle of the river, in neglecting to stop when the Narragansett blew the long whistle, and also when the Naragansett blew, afterwards, one whistle, in that she did not change her course, but continued straight on up the river, in attempting to cross the bows of the Naragansett when she should have passed along-side of the port side and under the stern of the Narragansett, in continuing at a high rate of speed instead of stopping, and in not avoiding the Naragansett when she had her on the star board hand, as the law directs."

Pier 33, at which the Narragansett lay, was a covered pier, with openings in the south side of the shed, so situated that the steam-ship's gangways were always brought against the same points of the side of the pier, and so as to bring her stem about 45 feet inside the end of the pier. The stem of the Naragansett was 45 feet forward of the front windows of her pilot-house. She lay at the pier with her stem towards the river. Pier 32, the next below 33, is a short pier and of no account in this controversy. Pier 31, which is about 210 feet below pier 33, projects into the river about as far as pier 33. It is a covered pier, having a shed upon it which reaches within about 20 feet of the end of the pier, and for a distance of 25 feet back from that point rises to a height of 27 feet and 9 inches above the pier. The height of the captain's eye above the water, as he stands in the pilot-house of the Narragansett, when she is loaded, is about 31 feet. Consequently, at low stages of the tide, the shed on pier 31 effectually shuts out from those in the pilot-house of

the Narragansett, as she lies at her pier, the view down the river between the line of the piers and the line drawn from the pilot-house by the outer end of the shed on pier 31. While there is some controversy as to whether or not the tide was at the time of collision running up the river, there is no question that when the Narragansett left her pier she was so low in the water that, in fact, the shed on pier 31 obscured the view of the river inside of the line passing by this shed. The shed was not of the same height back of the 25 feet, and over this lower part of the shed a little of the river close in to the piers above pier 21, which projects further out than those above it, could be seen from the pilot-house; but this is of no consequence, since there is no claim that the City Point was within the space so exposed to view. The distance at which the City Point was running up the river, upon the evidence, is not precisely fixed, but it lay between the limits of 200 and 300 feet. Her master says about 300 feet.

It is conceded in the case that shortly before the collision the City Point gave a signal of two whistles in reply to a signal from the Narragansett, but the three chief points of the controversy as to matters of fact in the case are, what signals the Narragansett gave before this signal from the City Point; to what signal of the Narragansett this signal of the City Point was an answer; and at what distance in the river the City Point was at the time she gave this signal. The subsequent movements of the two vessels are too clearly proved to admit of doubt.

It is the contention of the City Point, as plainly alleged in the libel, that it was the long starting whistle of the Narragansett which the City Point thus answered; that the Narragansett had not then started, but, "shortly thereafter," put her wheels in motion; and that at the time of this exchange of signals the City Point was about opposite pier 30. Upon the hearing and in his brief, the learned counsel for the City Point takes somewhat different ground, claiming that the Narragansett did not blow her starting whistle at all, nor give any signal till she had moved forward so far as to bring

the City Point into view from her pilot-house. These two positions are irreconcilable, and the inconsistency does not strongly commend the case of the libellant; but I am satisfied that the great preponderance of the testimony is against the truth of either theory. The evidence shows very satisfactorily that when the bell was rung to start the Narragansett, at the very same time her long starting whistle was blown, that at that time the City Point was not in sight from her pilot-house, being hidden from view by the shed on pier 31; that after the Narragansett had moved forward till her stem was up, or nearly up, even with the end of her pier, those in her pilot-house saw the City Point as she came in sight by the outer end of the shed; that it was then that the Narragansett gave the signal to which the City Point replied with a signal of two whistles; that this signal of the Narragansett was a single sharp whistle; that it was intended as a signal to the City Point, and indicated that the Narragansett intended to keep on across her bows, passing to the right of her; that it was so understood by the City Point, but that the City Point, in giving the signal of two whistles, disagreed to this, and indicated her purpose to cross the bows of the Narragansett, or to pass to the left of her. It is easy to demonstrate, from admitted or well-proved facts in the case, that the theory of the libel is an impossibility. To the point of collision, the stem of the Narragansett had moved forward not more than 308 feet from where she lay at the pier. If the City Point was at or near the place stated in the libel when she gave the signal of two whistles in reply to the Narragansett's long starting whistle,—she, the Narragansett, still lying at her pier,—then, before the collision, she ran about 650 feet only. The distance from a point midway between piers 29 and 30 to pier 33 is 600 feet, and the bow of the City Point ran about 50 feet beyond the point of collision. The City Point was running at least nine miles an hour. She claims that a strong flood tide was with her, which, if so, must be added to her speed. On hearing the Narragansett's signal her master first rung to slow and stop, but im-

mediately, and as quickly as the bells could be rung, he rang to go ahead full speed, wide open, and thereafter till the collision she was going forward with accelerated speed. Immediately upon receiving the signal of two whistles from the City Point the master of the Narragansett rang to stop and back full speed, and her engine was reversed as soon as was possible, and continued to work full speed astern up to the instant of collision, and the evidence is clear that at the instant of collision she had no perceptible headway on her. The precise point at which the bow of the Narragansett was when the order to reverse was given is not fixed, but I am satisfied by the evidence of those in her pilot-house that it was given as quickly as it could be given on receiving the reply of the City Point.

The point made by the learned counsel for the libellant, that there was delay in giving this order, seems to be based upon the testimony of one of the witnesses as to how far the Narragansett had run forward when this order was given. This was a matter of judgment merely as to distance. Some distance was run, undoubtedly, from the position when the single whistle was blown by the Narragansett. The Narragansett kept on till there was time for the City Point to reply, and for the master of the Narragansett to ring his bells. But the testimony of several entirely credible witnesses is to the effect that the order to reverse was given without any delay, and this must control the mere judgment as to distance run, which is little better than a guess at best. Now, it is entirely incredible that while the Narragansett, assuming that she started immediately upon giving her long whistle, starting from a dead stand-still, was running 308 feet and there coming to a stand-still again, the City Point, at a uniform speed of nine miles an hour, should have only gone forward 650 feet.

The City Point, if going nine miles an hour, made 780 feet in a minute. Experiments made with the Narragansett show that it ordinarily requires from one minute and thirty-three seconds to one minute and forty-five seconds for her to

go her length in starting, and this when her speed has been of course constantly accelerated. It is hardly possible, therefore, to conclude that, considering her having reversed her engines on this occasion and come to a dead stop within the 308 feet, that she was less than two minutes and a half in moving forward 308 feet. Probably she was considerably longer. In two minutes the City Point must have gone 1,560 feet. The testimony as to the highest speed which the Narragansett attained varies from a mile and a half to four or five miles an hour. These are, of course, but judgments upon a point very difficult to determine from mere observation, but it may probably be safely concluded that her average speed did not exceed three miles an hour, or one-third that of the City Point. Upon this supposition, while she was going 308 feet the City Point must have gone 915 feet, which would place her below pier 29 when the Narragansett started, and about up to pier 28; and three miles an hour for the speed of the Narragansett seems clearly an excessive estimate. It is entirely clear, therefore, that the City Point cannot have been about pier 29 or 30 when she heard and replied to the starting whistle of the Narragansett, if that was the signal she replied to, as stated in the libel. It is probable, upon the proofs, that she was considerably below pier 28 when the starting whistle was sounded. The testimony of Captain Walden, of the Narragansett, is, and it is confirmed by the other witnesses in the pilot-house, that the City Point came in view to him when she was at or below pier 28, as she was uncovered by the shed on pier 31. It is in evidence, on the part of the libellant, that at a point 207 feet out from the end of pier 29 the pilot-house of the Narragansett, as she lies at her pier, just comes into view to a person on the river, and at 251 feet out from pier 28 the pilot-house also comes into view. It is most probable, upon the evidence, that the City Point was more than 251 feet from the piers, and it is, I think, proved that when the Narragansett started the City Point was not in view from her pilot-house, but came into view shortly afterwards; and when the

Narragansett had slowly moved forward about 40 feet, and, of course, while the Narragansett was moving the first 40 feet, the City Point was moving many times that distance. It follows that the City Point must have been below, and probably considerably below, pier 28 when the Narragansett started. The testimony on the part of the libellant is singularly uniform that the City Point was about off pier 29 or 30 when she heard and replied to the starting whistle of the Narragansett. It is, however, also very indefinite as to the position, and, with most of the witnesses, apparently not given with reference to an actual observation at the time as to their position in relation to the piers. The testimony on the part of those in charge of the Narragansett, that when the City Point answered by a double whistle—not in reply to the starting whistle of the Narragansett, but in reply to another and later signal of a single whistle, after she had started and had gone forward some little distance—the City Point was as low down as pier 28 or lower, is confirmed by the testimony of by-standers having no interest in the cause; it is consistent, and it alone is consistent, with the necessary deductions to be drawn from the distances run by the two boats before the collision. And, upon the whole testimony, it must be held as proved that at this exchange of signals the City Point was down at least as far as pier 28, a distance of 900 feet from the line on which the Narragansett was coming out, and that those on the City Point had failed to notice the starting whistle of the Narragansett, which had just before been blown, although the testimony is that it could be heard two miles. This being the relative positions of the two vessels, the Narragansett being in motion, though slowly, when she blew the single whistle, and the City Point having the Narragansett on her starboard hand, and their courses crossing so as to involve danger of collision, the nineteenth rule clearly applies, and the City Point was bound to keep out of the way of the Narragansett. *The Propeller John Taylor*, 6 Ben. 227.

It matters not that the Narragansett was still within the slip when she blew this whistle. She was in full view of the

City Point, and it must have been obvious if those on the City Point watched her, that she was in motion and not lying still at the dock. They had a full view of her bow and of her port side, aft, as far as her pilot-house, and they could see that she was moving out, even if they had failed to notice the starting whistle which was notice to them that she was about to start her engines. The master of the City Point was also perfectly familiar with the starting time of the Narragansett, which was 5 o'clock, and he knew that she was already late. It was a violation of a positive rule of navigation, therefore, for the City Point not to give way and allow the Narragansett to proceed. Instead of giving two whistles, which showed her purpose to go across the bows of the Narragansett, she should have slowed up, and, if necessary, stopped till the Narragansett had gone by. By giving the double whistle she forced the Narragansett to stop and back, which was then the only means of avoiding a collision.

The Narragansett did her utmost, by stopping and backing, to prevent a collision, and if the City Point had done the same, upon finding that there was a disagreement in the signals, there would have been no collision. It is claimed on the part of the City Point that she was unable to avoid a collision by stopping and backing; that she had neither time nor space to stop her headway. There is no foundation for this claim. Upon the evidence, she could be stopped in two or three of her lengths, and there is no proof of a wind or tide just at that time and place seriously increasing the difficulty in stopping her. As to the wind, it was not sufficiently strong materially to affect the navigation of the vessels. As to the tide, the testimony of the witnesses is irreconcilable. The almanac shows that the flood tide had been running an hour and a half, but I think the weight of the testimony is that in that part of the river there was, at that time, no current up stream. It was shown that the debris from the wreck floated out a little way into the river, but remained subsequently stationary for 15 or 20 minutes. But even if the tide was running flood, as claimed, the testimony will not war-

rant the conclusion that the City Point could not be stopped within the distance that she was from the Narragansett. The testimony that she could not be stopped is based mainly on the theory that she was up to pier 30, which, as shown above, is unfounded. There is a suggestion in the evidence that she was peculiarly hard to handle and difficult to stop. While this is not proved to the extent of showing that she could not be stopped in three times her length, it would not help her case if it were shown; since, if she was so exceptionally hard to stop, it was very imprudent and unsafe for her to run at full speed so near the docks, where she was almost certain to be brought into a position at any minute requiring her to stop suddenly on account of something coming out from between the piers and crossing her course.

It follows, therefore, that the Narragansett was not in fault for giving the single whistle, or for keeping on her course till she received the conflicting signal from the City Point; that the City Point was in fault in giving that signal and in not giving way to the Narragansett, and in not stopping and, if necessary, backing, to avoid the Narragansett, upon discovering her and receiving her signal. After receiving the signal of the City Point the Narragansett did all she could to avoid the collision or diminish its dangers. Her conduct in this respect was in striking contrast to that of the City Point. The City Point could have avoided the collision either by stopping and backing, or by throwing her wheel instantly hard a-starboard, neither of which she did. Just before the vessels came together the Narragansett gave another single whistle. The collision was then inevitable. The signal was not called for by the situation, but it did neither good nor harm. It is stated in the answer that this whistle immediately followed the double whistle of the City Point, but the proof is that it was later, and just before the vessels struck. I do not see that it has any material bearing on the controversy.

It is claimed that the Narragansett was in fault in not sooner discovering the City Point; that she should have had

a man posted on the end of the pier who would have an unobstructed view up and down the river, to give warning before she started of any approaching vessel, or a man on top of the wheel-house, from which point an unobstructed view could be had down the river over the shed on pier 31. It may be that a case may arise where a steam-boat going out as the Narragansett does, as she blows her starting whistle, may not by this signal give a sufficiently timely warning to a vessel that happens to be very near and approaching from above or from below close into the piers and under cover of the shed, so as to enable the approaching vessel to avoid her after hearing the starting whistle. And it is possible that in such a case it may be held negligence not to have taken precautions to see the vessel approaching; but that is not this case. The starting whistle was notice to the City Point that she was just starting to come out, and when she came out and made the City Point there was ample time and space for the vessels to avoid each other by observing the ordinary rules of navigation. The only danger of collision, then, was from the violation of these rules on the part of the City Point. The failure of the Narragansett to see her had not involved the vessels in any risk of collision, and, if her position had been clearly understood when the Narragansett was ready to start, I see no reason why she should not have come out just as she did; her signal to the City Point was timely and proper. There was no occasion for the lookout on her bow to report the City Point. She was not near enough before the Narragansett signalled her to suggest any danger, and, by the rules, she was required to keep out of the way. The second mate was temporarily on the lookout, waiting for another of the ship's company to take that post. He did not think a report necessary, and I am not able to say that there was, in this omission, any fault which caused or contributed to cause this collision.

The proof is that the piers between piers 21 and 33, and above, are steam-boat and ferry piers, to and from which steam-boats are constantly passing; that several of the sound steam-boats go out about the hour the City Point was

coming up that afternoon. Considering the use of these piers, and the great number of steam-boats going in and out, it was imprudent and reckless navigation for the City Point to run at so great a speed so near the line of the piers. A statute of New York is referred to prohibiting vessels from running along the piers on the East river at a speed exceeding 10 miles an hour, as if this justified the City Point in the speed she kept up. But imposing a penalty for exceeding 10 miles by no means makes any less speed prudent. The speed must be regulated by the dangers attending the navigation under the particular circumstances of the case. There was no reason for the City Point keeping so close to the piers except her own convenience to make the shortest run to her next landing. If she chose to go so close in, she was bound to proceed with the more caution, and in such a way that she could check her headway easily, for she was constantly liable to have her course crossed by other vessels proceeding slowly out of the docks and on her starboard hand.

Upon the whole case, it is clear that the collision was caused solely by the gross carelessness and mismanagement of those in charge of the City Point.

Libel dismissed, with costs.

CLARKSON and others v. MANSON.

(Circuit Court, S. D. New York. November 15, 1880.)

1. REMOVAL—COUNTER CLAIM—AMOUNT IN DISPUTE—ACT OF 1875, § 2.—Where the issue raised by a counter claim and reply exceeds the amount of \$500, the matter in dispute exceeds the sum of \$500, within the meaning of section 2 of the act of 1875, relating to the removal of causes, although the original action was brought for a less sum than \$500.

Motion to Remand.

Ira D. Warren and John Bassett, Jr., for the motion.

D. M. Porter and George H. Kracht, opposed.

BLATCHFORD, C. J. The plaintiffs brought this suit against the defendant in the marine court of the city of New York to recover the sum of \$195, as the balance unpaid on a sale of the fixtures of a store and bake-house. The answer put in in the state court sets up that the plaintiffs, with intent to defraud, falsely represented to the defendant that the bake-house was a profitable business place, and that one Ott, a former proprietor of it, had done a profitable business at it, and thus induced the defendant to hire the store; that the plaintiffs also represented that they owned the store and the bakery fixtures in it, and offered to sell them to him; that he, to secure for one day the right to purchase them, paid to plaintiffs five dollars as a deposit, on the agreement that if he was not satisfied with the fixtures the five dollars should be forfeited; that the defendant, not being satisfied with the store and fixtures, immediately notified the plaintiffs thereof; that the place had never been a profitable business place for a bakery; that Ott closed it because he could not make it pay the expense of keeping it; that the fixtures were mortgaged and were owned by Ott, and not by the plaintiffs; that the plaintiffs knew this; that the defendant, relying on said representations and believing them to be true, rented the store and furnished it with new fixtures, and made repairs in it, and fitted it up at great expense, and hired help to conduct the business of the bakery; and that he has not realized

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any moneys from the business carried on at the place, and was unable to make the business pay expenses, but was obliged to close it, to his damage \$750, which he sets up as a counter claim against the plaintiffs.

The answer denies all the allegations of the complaint not thus admitted or denied, and demands judgment against the plaintiffs that the complaint be dismissed with costs, and that he have judgment against the plaintiffs for \$750. This answer was put in September 13, 1880. A reply, sworn to September 15, 1880, was put in by the plaintiff, replying "to the allegations of counter claim contained in the answer," and denying each and every of said allegations.

On the twentieth of September, 1880, the defendant presented to the state court a petition, signed and sworn to by him September 18, 1880, setting forth the pendency of the suit as an action commenced and pending by the plaintiffs against the defendant; that the plaintiffs are, and were at the time of the commencement of the action, citizens of New York, and the defendant a citizen of New Jersey; "that the matter in dispute in this action exceeds, exclusive of costs, the sum or value of \$500;" that "the defendant has appeared in this action, in this court, and answered the complaint;" that the action had not yet been tried; and that no term had passed since it was commenced at which it could be tried.

The petition prays that "the said suit may be removed" to this court. The proper bond was given and approved by the state court, and on the twentieth of September, 1880, that court made an order *ex parte*, which recites the contents of the petition and the tenor of the bond; and, "on reading and filing a copy of the pleadings in said action," and the petition and the bond, orders that the petition and bond be accepted, and declares that said court will proceed no further in the suit, it being removed to this court. Afterwards, and before the commencement of the next term of this court, and before a copy of the record in the state court was filed in this court, that court made an order vacating the said order of removal. The ground assigned for making this second order, in the decision made by Judge McAdam, the judge of the state court,

was that the amount in dispute in the suit was only the amount stated in the complaint, and not the amount claimed in the counter claim set up in the answer; and that as the matter in dispute did not exceed, exclusive of costs, the sum or value of \$500, the case was not one for a removal under section 2 of the act of March 3, 1875, (18 U. S. St. at Large, 470.) Notwithstanding this second order, the defendant, claiming that the suit was removed to this court, filed in this court, on the first day of this term, a certified copy from the state court of the proceedings therein, to and including the order of removal, and entered an order *ex parte*, as an order of course, not signed by a judge, reciting the filing of said copy record, and ordering that the cause proceed no further in the state court, and that it proceed in this court in the same manner as if it had been originally commenced therein, and that the appearance of the defendant be and was thereby entered.

The plaintiffs now move for an order vacating the order so entered in this court, and remanding this action to the state court, and striking from the files of this court the record so filed here. It appears when the order of removal was made the pleadings in this case were none of them exhibited to the judge of the state court, although the order of removal recited that they were read. They were presented on the making of the second order.

The second section of the act of 1875 provides that "any suit, * * * where the matter in dispute exceeds, exclusive of costs, the sum or value of '\$500,' in which there shall be a controversy between citizens of different states, * * * either party may remove said suit." The defendant here contends that the matter in dispute, on the issue raised by the counter claim in the answer, and the reply thereto, exceeds \$500, exclusive of costs; that there is a controversy in regard to such matter, made a controversy conclusively by the plaintiff, by his reply to the counter claim; and that on this ground the defendant can remove the whole suit into this court.

Under the New York Code of Civil Procedure, § 500, an answer may contain a counter claim; that is, a statement of new matter constituting a counter claim. Such counter claim (section 501) must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of certain specified causes of action. A plaintiff may (sections 494, 495, 496) demur to a counter claim, distinctly specifying the objections, one of which may be that the counter claim is not of the character specified in section 501. Where a counter claim is established which equals the plaintiff's demand, judgment goes for the defendant. Where it is less than the plaintiff's demand the plaintiff has judgment for the residue. Where it exceeds the plaintiff's demand the defendant has judgment for the excess, or so much thereof as is due from the plaintiff. Section 503. The plaintiff, if he does not demur, may reply to the counter claim, denying what he controverts. Section 514.

A counter claim is held to be an affirmation of a cause of action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff. As a cross-action, setting forth a cause of action by the defendant against the plaintiffs, and demanding a judgment thereon for \$750, in addition to the dismissal of the plaintiffs' complaint and the defeat of the plaintiffs' claim,—the claim in which cross-action is disputed by the plaintiffs by the reply,—the counter claim clearly brings into the suit a matter in dispute which exceeds \$500 in value. Even if the defendant should have judgment only for the difference between \$195 and \$750, that would be more than \$500; but he claims \$750, and that the plaintiffs shall have no judgment. There may be two actions in one point of view. One may be regarded as an action by the plaintiffs against the defendant to recover the \$195. The plaintiffs may fail to recover any part of that, or they may recover a part of it, or they may recover the whole of it. The answer, and the counter claim in it, may have the effect, if proved, to diminish or defeat the plaintiffs' recovery. Section 501. If the

plaintiffs' recovery is wholly defeated, then the defendant becomes actor, and may recover judgment for the whole or a part of the \$750.

Still, both proceedings are in one suit, as the word "suit" is used in the act of 1875. The first section of the act of 1875 uses the expressions "suits of a civil nature," "civil action," and "civil suit" as synonymous. The second section of that act uses the expressions "suits of a civil nature" and "said suit" in the same sense. The third section of that act uses the expressions "suit" and "such suit," and "the cause" and "action" in the same sense. The same is true of the same words, and also of the word "case," when used in the subsequent sections of that act. In the sense of sections 2 and 6 of the old code of procedure of New York (unrepealed) the proceeding by the defendant against the plaintiffs to recover the \$750 is an action and a civil action, the defendant being permitted to become actor in the given case. The statutes of New York now use the word "action," and discard all other terms. The proceeding by the defendant against the plaintiffs being a civil action, in a suit of a civil nature, and the matter in dispute in it exceeding, exclusive of costs, the sum or value of \$500, is brought in the state court, under the authority of the statute of New York, in the form in which it is brought, although the defendant is turned into a plaintiff and the plaintiff into a defendant, and jurisdiction of the person of the plaintiff is obtained by the fact that the plaintiff came into court and brought the defendant in first, in the action brought by the plaintiff. It clearly makes a case for removal. But what is to be removed? The act of 1875 says that "said suit" is to be removed. Is the proceeding or action by the defendant, his affirmative claim, the only thing that is to be removed, leaving the claim of the plaintiffs to be litigated in the state court, the former claim being \$750 and the latter \$195?

In view of the facts that the suit is in form one brought by the plaintiffs against the defendant, and includes the plaintiffs' claim, by the voluntary act of the plaintiffs, and is made to include the defendant's claim by the operation of the stat-

ute of New York, and that thus there is but one suit, though there are two controversies in it, and that the whole suit is to be removed, and that either party may remove it, and that the counter claim necessarily "must tend in some way to diminish or defeat the plaintiffs' recovery," it follows that the whole suit is removed, including all the issues, by the complaint, the answer and counter claim, and the reply.

The case of *West v. Aurora City*, 6 Wall. 139, is not in point. The facts there were not at all like the facts in this case, and it arose under a different statute.

In *McLean v. St. Paul, etc., Ry. Co.* 16 Blatchf. 309, construction was given to section 2 of the act of 1875, to the effect that a suit, where the requisite citizenship for removal did not exist when the suit was brought, might become removable by the occurrence of the requisite citizenship during the pendency of the suit. Under that ruling it must be held that it is not necessary that the requisite amount in dispute should appear to have existed when the suit was brought. After proceedings for removal are completed, a party cannot be deprived of his right, by any action of the state court or of the other party, in reducing the amount appearing to be in dispute. *Kanouse v. Martin*, 15 How. 198. But there is nothing to prevent a state court from allowing an insufficient amount in dispute to become an adequate amount, under the act of 1875, or prevent such insufficient amount from becoming an adequate amount under that act by the operation of the statute of New York and the lawful acts of the parties to the suit thereunder.

The motion to remand the suit and for other relief is denied.

CONNECTICUT MUT. LIFE INS. CO. v. SCAMMON and others.

(Circuit Court, N. D. Illinois. ———, 1880.)

1. **POLICY OF INSURANCE—LIFE TENANT—REVERSIONERS—MORTGAGOR AND MORTGAGEE.**—A policy of insurance running in terms to a life tenant, and procured as additional security under the covenants of a mortgage jointly executed by such life tenant and the owners of the reversion, *held*, under the circumstances of this case, to enure to the joint benefit of all the mortgagors.
2. **LIFE TENANT—WAIVER OF INSURANCE MONEY—MORTGAGOR AND MORTGAGEE.**—*Held, further*, that the authority of such life tenant to waive the application of the proceeds of such insurance policy upon the mortgage debt could not be inferred from a general power to insure the mortgaged property.
3. **SAME—SAME—CONSENT—SILENCE.**—*Held, further*, that consent to such waiver could not be inferred from the silence of the owners of the reversion, when they had no knowledge of the transaction.
4. **SAME—MORTGAGEE—APPLICATION OF INSURANCE MONEY.**—*Held, further*, that if, in any view of the case, the mortgagee could, without the knowledge of the owners of the fee, agree with the life tenant to place the proceeds of the insurance policy back upon the mortgaged premises, he was bound to see that such agreement was carried out, and that the money was so used.
Gordon v. Ware Savings Bank, 115 Mass. 588, considered.
5. **EQUITY PRACTICE—APPLICATION OF INSURANCE MONEY.**—*Held, further*, that the rules of equity practice were sufficiently flexible to admit the proper application of the insurance money to the mortgage debt in this case.
6. **POLICY OF INSURANCE—LOSS PAYABLE TO MORTGAGEE—ASSIGNMENT—COLLATERAL SECURITY.**—A provision in a policy of insurance, that the loss should be payable to the mortgagee, operates to give the mortgagee precisely the same rights and interest in a policy which he would have had if, without such words, the policy had been assigned as collateral security to the mortgage debt.
Jones on Mortgages, § 407

Isham & Lincoln, for complainant.*C. F. White*, for defendants Florence A. D. Reed and Arianna E. Scammon.

DYER, D. J. This a bill for foreclosure of a mortgage executed to complainant in 1866 by the defendants J. Y. Scammon, Florence A. D. Reed, formerly Scammon, and Arianna

E. Scammon; the two defendants last named being daughters of the defendant J. Y. Scammon. The mortgage originally covered lot No. 5, in block No. 11, in Fort Dearborn addition to Chicago, and was made to secure the payment of \$30,000 and interest. It is admitted in the bill that in 1867 the sum of \$10,000 was paid to apply on the principal, and it is alleged that the balance of the original principal, namely, \$20,000, with interest, remains unpaid, besides certain sums of money paid by complainant to redeem the mortgaged premises from tax sales. Defences have been interposed by the defendants Florence A. D. Reed and Arianna E. Scammon, and the case has been heard upon their exceptions to the report of the master to whom the cause was referred.

Originally, the mortgaged premises were owned in her separate right by Mary Ann H. D. Scammon, then the wife of the defendant J. Y. Scammon, but since deceased. Upon her death, the property by descent passed to her three children, Charles T. Scammon, and the defendants Florence A. D. Reed and Arianna E. Scammon, subject, however, to a life estate therein of their father. Subsequently, but prior to the execution of the mortgage in suit, Mr. Scammon acquired the interest of his son, Charles T. Scammon; so that at the date of the mortgage he was the owner in fee of an undivided one-third interest in the premises. This being the state of the title, on the tenth day of September, 1866, Mr. Scammon and his two daughters joined in the execution of a bond to the complainant, conditioned for the payment of the sum of \$30,000 on the tenth day of September, 1871, with interest payable half yearly at 8 per cent.; and to secure the payment of this bond they executed the mortgage in question. This bond and mortgage were given to secure the repayment to complainant of a loan then made for the purpose of erecting a building on the premises; and the money thus borrowed and secured was so used.

The mortgage contained a clause binding the mortgagors to keep the buildings thereafter erected on the premises insured against loss or damage by fire, and to assign and deliver to complainant the policies of insurance therefor, whenever such

insurance should be effected; and it was further provided that the complainant should hold such policies of insurance as collateral and additional security for the payment of the principal sum, secured by the mortgage, and interest, and should have the right to collect and receive all sums of money that might at any time become collectible upon such policies of insurance, and apply the same, when received, in the same manner, as far as possible, as was provided in the mortgage in case of a sale of the mortgaged premises under the power of sale therein contained. Pursuant to these requirements of the mortgage insurance was obtained, in the sum of \$15,000, upon the building erected on the premises. The policy of insurance, in terms, run to J. Y. Scammon alone, and contained a clause in the usual form: "Loss, if any, payable to the Connecticut Mutual Life Insurance Company."

On the tenth day of September, 1867, by agreement between J. Y. Scammon and his daughters, a partition of the mortgaged premises was made by which the south one-third thereof was set off to Mr. Scammon as the parcel in which he should thereafter have a clear estate in fee; and the north two-thirds were set off to the defendants Florence A. D. Reed and Arianna E. Scammon, to be held by them in fee, subject, however, to the life estate of their father. The object of this agreement of partition appears to have been to enable Scammon to convey the south one-third of the lot to the Marine Company of Chicago, and to enable his daughters, at his death, to hold the north two-thirds of the lot free from all other claims of title under Mr. Scammon. Concurrently with the making of this partition \$10,000 was paid to complainant to apply on the principal of the bond and mortgage in suit, and the south one-third of the mortgaged premises so set off to Mr. Scammon was then released by complainant from the lien of the mortgage, and thereafter his interest in the mortgaged premises yet covered by the mortgage consisted of a life estate; and it is understood that the building then situated on the premises stood upon that part of the same set off under the partition to Mr. Scammon's two daughters.

This building was totally destroyed in the great fire of October, 1871.

In settlement of the insurance on the same the fire insurance company delivered to the defendant Scammon a draft for \$15,000, payable to the order of complainant; and thereupon Scammon, in a communication addressed to the secretary of the complainant, informed him that he had commenced rebuilding the burned structures, and enclosed therein the draft received for insurance, and requested that authority might be given to complainant's Chicago agent to pay over to him (Scammon) or to the Marine Company, the proceeds of the draft, to be expended in such rebuilding. This request resulted in an agreement, made on the fifth day of January, 1872, between complainant and J. Y. Scammon alone, by which it was agreed that complainant should and did waive its right to apply the insurance money on the mortgage indebtedness, and that this money should be deposited in such bank as should be selected by Scammon and assented to by complainant, to the credit and at the risk of Scammon, to be used in the erection of buildings on the mortgaged premises; that this money should be paid out in the erection of such buildings, from time to time, on the drafts or checks of Scammon, countersigned by complainant's agent, until it should be thus fully expended; further, that such drafts or checks should be so countersigned on presentation thereof to complainant's agent, accompanied with the certificate of an architect, that the amount of such check or draft, together with all previous checks or drafts drawn or paid out on such account, had been actually expended in permanent improvements upon the mortgaged premises; further, that so soon as the building or buildings so erected should be in a situation to be insured, Scammon should cause the same to be insured in the fair insurable value thereof, and assign the policies of insurance to complainant, and that thereupon all the provisions contained in the mortgage should apply to such insurance.

By this agreement it was further provided that any receipt or acknowledgment given by complainant, either alone or

jointly with others, to any such insurance company, for the purpose of facilitating the collection by Scammon of any insurance money intended to be placed back on the mortgaged premises, should not be construed as a collection of the money by complainant under the conditions of the mortgage, wherein it was provided that complainant might collect and apply such insurance money upon the indebtedness secured to be paid thereby, but should be regarded as merely enabling Scammon to collect such insurance money; and it was expressly provided that this money was not to be so applied, and that the mortgage should remain a lien on the premises for the full amount of the principal sum mentioned in the bond, with interest, as if said insurance money had never been collected. It was also agreed that in case the insurance money should not be expended in rebuilding, within six months from the date of the agreement, then said agreement of waiver should have no effect, but that the right of Scammon to use and expend the same should thereupon cease, and that complainant should have the right to draw from the bank where the same was deposited, upon its own check, said insurance money, or so much thereof as had not then been actually expended, and apply the same in payment, *pro tanto*, of the indebtedness secured by the mortgage.

Thereupon complainant, by its secretary, by indorsement on the draft for \$15,000 received from the fire insurance company, made the same payable to J. Y. Scammon, or order, who designated the Marine Company of Chicago as the banking office in which the insurance money should be deposited, and delivered the same back to Scammon so indorsed, and the proceeds of the draft were then received by Scammon and deposited with the Marine Company. Thereafter the money thus realized on account of the insurance, and so deposited, was drawn out by the defendant Scammon on his own checks or drafts, and not in pursuance of the aforesaid agreement between him and complainant; but new structures were not erected on the mortgaged premises, and the proceeds of insurance were not used by Scammon for that purpose as contemplated by the agreement. Further mate-

rial facts in the case are that when complainant originally took the mortgage in question, it, by its agent, knew the state of the title of the mortgaged premises; that in the erection of the building on the premises, in causing it to be insured, and in collecting rents, and paying premiums and taxes, the defendant J. Y. Scammon dealt with the property as if it were his own; and that the entire business connected with the loan from complainant, from the time of its original negotiation down to the time of the before-mentioned agreement in relation to the insurance, was transacted by the defendant Scammon. The evidence tends to show that he kept an account with the property on his bank ledger, in which rents received by him were credited; and that, either in this or in a separate account, moneys paid by him for insurance premiums were also entered.

It appears, further, that the defendants Florence A. D. Reed and Arianna E. Scammon knew nothing at the time of the insurance obtained upon the property, nor of the agreement in relation to the insurance money between their father and complainant, made in 1872. There is no doubt that when complainant consented to the payment of the insurance money to Scammon, it was expected that it would be used in rebuilding, and that it was paid to and received by him in good faith for that purpose; and there is evidence to the effect that the officers of the bank understood at the time that this money was placed in the bank in the character of a special deposit, and subject to the conditions of the agreement between complainant and Scammon. Further, it seems clear that Scammon was never expressly authorized by complainant to draw out or appropriate the money as he seems to have done. Indeed, the performance of the agreement, under which the insurance money was surrendered to Scammon and deposited in the bank, seems to have been abandoned by both parties thereto, as it does not appear that the contract was at all regarded by Scammon in the appropriation of the money, nor was it insisted upon by complainant, so far as the evidence discloses.

The two mortgagors, Florence A. D. Reed and Arianna E.

Scammon, according to the evidence, were not consulted about the disposition of the insurance money, and, so far as is shown, had no knowledge of and gave no consent to its payment to their father, or to its deposit in the bank; nor have they ever asserted any rights in relation thereto until the commencement of this suit.

Upon the case stated it is insisted by the defendants, who contest complainant's right to a decree, that the insurance money in question was in legal effect collected by complainant, and, in fact, came to its hands; that complainant had no authority to surrender the same to the defendant J. Y. Scammon; that its receipt by complainant constituted satisfaction *pro tanto* of the mortgage; that the covenant in the mortgage for insurance operated as an assignment of the insurance fund, when collected, to the mortgagee; and that it could not, under any arrangement made with J. Y. Scammon, without their consent, be legally paid back to him and the mortgage be still kept in force, to their prejudice, and as a continuing or renewed encumbrance upon their interest. On the other hand, it is contended that the defendant J. Y. Scammon had an insurable interest in the mortgaged premises; that all of the mortgagors agreed in their mortgage to furnish insurance to the full value of their insurable interests; that the two defendants who make defence procured no insurance on the property or their interest therein; that the policy of insurance run to J. Y. Scammon alone, and, therefore, that he could recover upon the policy no matter what his interest in the property was; that his daughters had no interest in the proceeds of the insurance; that the policy was held by complainant as collateral security; that it could elect, if it chose, not to collect the insurance, and, if collected, it could rightfully pay the money back to the party insured; that the daughters had no interest or concern in the transaction, and that the insurance which was obtained only in legal effect covered the interest of J. Y. Scammon in the property.

In reply it is urged that the insurance was procured as additional security to the mortgage; that, though it was taken in the individual name of J. Y. Scammon, it was furnished

under the covenants of the mortgage, and that it did not enure to the benefit of J. Y. Scammon alone, but was treated by all the parties as, and was in fact, a proceeding for the benefit of all, and which protected the interests of all.

Upon complainant's theory, therefore, the \$15,000 received on account of the insurance is not to be treated as a payment upon the mortgage, or as money received by complainant which it was bound to apply upon the mortgage; while, on the theory of the contesting defendants, that money should have been applied in payment of the mortgage indebtedness, and its receipt by complainant operated as a satisfaction *pro tanto* of the mortgage, so far as the interests of those defendants were involved, and so left unpaid only the sum of \$5,000 and interest.

Upon the assumption that the policy of insurance covered not only the interest of J. Y. Scammon in the insured property, but also that of his daughters, it becomes important, first, to inquire whether, in making the agreement with complainant by which the insurance money was surrendered to Scammon, he acted not only for himself but also as the authorized representative of his daughters; because, if in that transaction he was their authorized agent, it is obvious they could have no ground of complaint, and that would end this controversy. Manifestly he stood in a twofold relation to the property—*First*, as the owner of the life estate; and, *secondly*, as the representative, to a certain extent, of the owners of the reversion. The individual acts of Mrs. Reed and Arianna Scammon, in connection with the property, done at the time of, and subsequent to, the original loan, appear to have been limited to the execution of the bond and mortgage in the suit, and the making of the agreement of partition with their father. It must be assumed that he was left with unrestricted authority to manage the property to the extent of erecting buildings thereon, collecting rents, paying taxes, and procuring insurance. So far as those acts affected the interests of the owners of the fee, they must be considered as done under authority, express or implied. Moreover, as to some if not all of such acts, he had not only the legal right,

but as the owner of the life estate, receiving the rents and profits, it was his legal duty to do them.

As the mortgage contained a covenant to keep the buildings insured, and as the care and management of the property were entrusted wholly to Mr. Scammon, it is clear that his act of procuring insurance as additional security to the mortgage was within the scope of his agency as the representative of the interest of his daughters. It was a legitimate incident to the business of managing and preserving the property. But it is not to be overlooked that this and the other acts before specified were such as touched the property in its character as real estate, and the question is, could authority to make the special agreement in relation to the insurance money, so far as it affected the interests of his daughters, be implied from the general power he possessed and exercised over the property? I am of opinion it could not. In support of this conclusion it is to be borne in mind that the instrument which required insurance to be obtained, and which in its provisions controlled the destiny of the insurance money, was executed not by Mr. Scammon, for and as the agent of his daughters, but by those persons acting for themselves. The covenants and stipulations of the mortgage were made effective by their own signatures and seals. The origin of the obligations and rights of all the parties with reference to insurance, and any moneys derived therefrom, was the mortgage; and, direction having been therein given as to the ultimate disposition of the same, so serious a departure therefrom as a waiver of valuable rights and a diversion of the fund would involve, would require the sanction of the owners of the fee, so far as their interests were concerned. The waiver of rights established by the mortgage, the virtual revocation of special contract provisions, involved an extraordinary power, not falling within such general control over the property as the owner of the life estate was accustomed to exercise. It was outside the scope of his agency, and not properly incident to any general powers pertaining thereto. Consent on the part of the owners of the fee to any diversion,

of the insurance moneys cannot be inferred from their silence, because they had no knowledge of the transaction.

It will be understood that all this is said upon the theory that the contesting defendants had an interest in the insurance, and in such application of the insurance fund as the mortgage contemplated; and it is also said in the light of the fact that that fund was allowed to be personally appropriated by the owner of the life estate, and was not used in rebuilding. How far the equities of the parties might have been affected if the moneys had been used in rebuilding, and whether that might not have been regarded as a restoration of the lost property, and therefore a benefit to the parties interested equivalent to an application of the moneys on the mortgage debt, are questions not necessary here to be considered. The facts, as we now have them, are that this agreement was made; that the owners of the fee were not parties to it, and never authorized it; that that agreement, even in the form in which it was made, was not performed; that performance was not required by complainant; and that the insurance moneys were ultimately diverted so that they neither benefited the mortgaged property nor were applied upon the mortgage debt.

The more difficult question is, had the owners of the fee any such interest in this insurance, or any such rights in the ultimate disposition of it, as to enable them to question the transaction in relation thereto between their father and complainant? The proposition that the insurance only covered the interest of Mr. Scammon in the property, was urged with so much force on the argument that I have not been without doubt in considering the question. Undoubtedly, as life tenant, he had an insurable interest in the property. And when the language of the policy, which is that the insurance company "do hereby insure J. Young Scammon * * * * against loss or damage by fire to the amount of \$15,000 * * * * on the four-story and basement brick building," etc., is considered, disconnected from other extrinsic facts, there is certainly force in the view that his interest only was

insured. But it is to be borne in mind that the interests of all the mortgagors in the mortgaged property, in common and without severance, was pledged for payment of the debt. Further, that the mortgage covenanted generally for insurance, and that it did not specify the several interests of the covenantors. The building was part of the realty, and the interests were undivided. They were dealt with as a unit. The obligation was not in terms that each mortgagor should cause his and her interest to be severally insured for the benefit of the mortgagee. Further, as before indicated, it was the legal duty of the defendant Scammon, as the life tenant receiving the rents and profits, to keep the building, as an entirety, insured, and in procuring insurance he must be held the agent of his daughters so far as their interests were involved. And when we consider the terms of the policy of insurance, as it is right to do, in connection with the covenants and stipulations in the mortgage, and the relations at the time of all the parties to each other, the conclusion must be, I think, that this insurance was obtained in pursuance of the requirements of the mortgage, and under the circumstances the presumption is that it covered what the mortgage specified, namely, the fair insurable value of the building, as an entirety, and in which were united the undivided interests of all the mortgagors.

The view thus taken is strongly confirmed by the manner in which the insurance proceeds were dealt with by complainant. The loss was payable by the terms of the policy to the mortgagee. The draft of the fire insurance company was payable to the mortgagee's order. It was evidently received and treated as a fund to be either applied on the debt or to be used in restoring the original security. The acts of complainant were equivalent to a collection of the insurance, for it had the draft in hand, indorsed it to Mr. Scammon by ordinary commercial indorsement, and assumed to control the ultimate destiny and use of the proceeds. If the money was to be relinquished and not to be applied on the mortgage debt, it is clear that complainant understood that the legal rights of the parties required that it be placed back on the mortgaged

premises, and hence the stringent provisions to that end in the agreement of January, 1872; and it was, of course, understood that the restoration of the building on the premises would enure as well to the benefit of the owners of the fee as to that of the owner of the life estate. So I say complainant dealt with the insurance not as Mr. Scammon's money, but as a further security furnished under the mortgage, and as something which affected the rights of all the mortgagors in the property, and in which all were interested.

If this be the correct view of the question the remaining question, which relates purely to the *rights* of the parties, would seem not to be difficult of solution. The provision of the policy, that the loss should be payable to the mortgagee, operated to give the mortgagee precisely the same rights and interest in the policy which it would have had if, without such words, the policy had been assigned as collateral security to the mortgage debt. 1 Jones on Mortgages, § 407, and cases cited. The proceeds of the insurance in the hands of complainant represented the insured property and the interests of all the mortgagors therein. The control exercised over the same by the mortgagee was equivalent to an election by it under the provisions of the mortgage to collect and receive the money. This being so, it was complainant's duty to use and apply it in accordance with the spirit of the provisions of the mortgage, and for the benefit of the parties beneficially interested, unless they consented to some other disposition of it. Indeed, it is difficult to perceive why, upon general principles of equity, so far as the rights of the owners of the reversion were concerned, complainant could not have been required to have had recourse to the insurance money as collateral security for payment *pro tanto* of the mortgage. If, in any view of the equities of the case, complainant might, without the knowledge of the owners of the fee, agree with the life tenant to place the money back on the mortgaged premises, it was bound to see that such agreement was carried out, and that the money was so used. Failing in this, and having as mortgagee received and undertaken to deal with the insurance proceeds as a fund representing the property,

equity will consider that as done which ought to have been done, and must therefore, so far as the interests of the non-consenting mortgagors are concerned, charge complainant with this fund and treat it as operative to satisfy the mortgage *pro tanto*.

The case at bar is distinguishable from *Gordon v. Ware Savings Bank*, 115 Mass. 588, which was cited by the learned counsel for complainant on the argument. That was a case where mortgaged premises were injured by fire, and the amount of the loss was paid by the insurer in pursuance of its agreement with the mortgagor to the first mortgagee, who subsequently paid the amount to the mortgagor to be applied in repairing the premises, so as to make them as valuable as before the fire; and in this case it was held, under the facts, that the holder of a second mortgage had no equity to have the amount so received applied in reduction of the debt secured by the first mortgage. The facts were that at the time the first mortgagee received the insurance money the mortgage debt was not due, and the mortgagor did not consent to the application of the money on the mortgage; and, moreover, and as a controlling feature of the transaction, the money was applied by the mortgagor to the restoration of the impaired security, for the benefit alike of all parties interested. These circumstances, of course, vitally affected the equities of the second mortgagee.

The point was made on the argument that the insurance money could not be applied on the mortgage debt without reducing the liability of the defendant Scammon equally with that of his co-obligors on the bond, which would be manifestly wrong. And the question was put, where can the line be drawn in the proposed application of this money in reduction of a liability which is joint, and which is secured by the pledge of interests that are undivided? The answer is that the rules of equity practice are sufficiently flexible to meet the case. The life estate may be charged with the same burden of liability as it was originally chargeable with, added to which is the personal liability of the defendant Scammon; and the estate of the owners of the fee may be charged with the proper proportion

of liability, namely, \$5,000, and interest. The decree can provide for a sale of the life estate as a security for the debt, unaffected by anything that has transpired between its owner and complainant, and suitable provision can be made touching the personal liability of the defendant Scammon for any deficiency. Further, the same decree can direct a sale of the interest of the other mortgagors to pay so much of the debt as is in excess of the \$15,000 realized from the insurance.

To the extent indicated the exceptions to the master's report will be sustained, and decree in conformity to this opinion.

PORTSMOUTH SAVINGS BANK v. CITY OF SPRINGFIELD.

(Circuit Court, S. D. Illinois. ———, 1880.)

1. MUNICIPAL BONDS—QUESTIONS AS TO VALIDITY.—All questions of doubt in relation to the validity of municipal bonds should be answered in favor of their legality, where the city has repeatedly recognized the validity of such bonds, and has paid interest on them for a series of years.

———, for plaintiff.

———, for defendant.

DRUMMOND, C. J. All questions of doubt in relation to the validity of these bonds should be answered in favor of their legality, because the city has recognized their validity repeatedly, and has paid the interest on them for a series of years. Therefore, under such circumstances as these, it should appear beyond all doubt that the issue of the bonds was void.

First, as to the state-house bonds: By the act of February 25, 1867, the governor was authorized to convey to the county of Sangamon and to the city of Springfield, for the use of the county and city, a piece of land known as the public square, upon which was located the state house, for the sum of \$200,000, and for the further consideration that the city and county should cause to be conveyed to the state a certain parcel of ground which was described. The law authorized the county of Sangamon and the city of Springfield to issue such bonds

and levy such taxes as might be necessary to raise the sum of \$200,000, and for the purchase of the tract of land which the city and county were required to convey to the state. In pursuance of this law some of the bonds in this case were issued by the city of Springfield, reciting that they were issued under this law, and for the purposes designated in the law.

The only objection of any force against these bonds is that, as the law authorized the governor to convey the particular lot of land called the state-house square to the county and city, and also authorized the county and the city to issue bonds, they have not been issued by the city and county jointly. It is true that the law might have been, and ought, perhaps, to have been, more specific in relation to the manner in which the bonds should be issued, but we have to take as it is and construe the law. Under the facts before the court it seems that the bonds in controversy here were issued by the city alone. Does that fact render this class of city bonds inoperative? I think not. There are many reasons why the construction which was given by the city and county authorities was proper, and such a construction as the statute warranted. There would undoubtedly be great difficulties and embarrassments connected with the issue and payment, by taxation or otherwise, of bonds given by the city and county jointly. They are separate and distinct corporations. True, the city is a corporation within the county of Sangamon, but in the administration of what are called governmental affairs, and nearly all of which concern the welfare of the people, the mayor and common council of the city have exclusive authority. The county has no jurisdiction and control over much which pertains to the welfare of the citizens of Springfield, so that it was not unnatural, I think, when this statute came to be considered by the citizens of the city and of the county, that an arrangement should be made between them by which they should sever in the bonds which the law contemplated should be given, so that a separate distribution should be made. That it was, in fact, made, does not particularly appear as to the funds to be raised, although it is admitted that an amicable arrangement was made between the respective

corporations, and the bonds were issued by them separately. There might be other reasons mentioned which might cause the city and county to sever in the issue of bonds; but enough, I think, has been stated to show that it was not a violent or forced construction of this statute that the two corporations should issue bonds separately. Under all the circumstances of the case, can the city of Springfield be allowed, at this time, even admitting that there was a doubt in relation to the point above considered, to come in and contest the validity of these bonds, on the ground that they ought to have been jointly issued with the county? It ought to be clear that such issue was in violation of the statute, and that it was not competent for the city to exercise the powers it did. I think that is not the fact.

Many of the authorities which might be referred to would apply to a case like this. These bonds were issued under this statute. The interest on them has been paid, and their legality and validity never denied, for many years, and it would be hard on *bona fide* holders of these bonds to allow the city at this time to contest their validity.

As to the bonds given by the city called the water-works bonds, I have, during the argument, adverted to the statute upon the subject, but will now briefly recur to it to show that these bonds are also valid. They were issued under a statute of the state to incorporate the Springfield Water-works Company. By this statute there was a special corporate power created, which was clothed with authority to do certain acts in connection with the administration of the municipal affairs of the town, but it was not intended this corporate power should be severed from the city of Springfield; it was to be a power of the city of Springfield, and to carry out, through a separate and distinct body, one of the objects for which the city of Springfield was created as a corporation. It was so intended because it was supposed that a body of men specially selected with a view to their qualifications for such a duty, and having, to a certain extent, an independent authority, would be more competent to execute the powers which the legislature had in view when it passed this law.

The whole scope of the law shows that this special body was a part of the municipality of Springfield, although independent of its functions and power. By the eighth section of the act these commissioners thus created had authority to borrow money if the city council should deem it expedient; but they had not the right to borrow independent of the city council. Money was to be borrowed upon the credit of the city. They were to have power also, with the approval of the city council, to issue bonds, pledging the faith and credit of the city for their payment, principal and interest. These bonds were to be issued under the corporate seal of the city, signed by the mayor and clerk, and made payable at such places, and in such currency, as they should deem expedient; and such bonds were not to be issued until the city council should approve of their issue by a vote of a majority of all the aldermen by law authorized to be elected.

Now, it clearly appears, from these provisions of the statute, that although there was a separate corporate body created by this law, called the water commissioners, in relation to the issue of bonds they had not authority of themselves, but must act in co-operation and in connection with the city. They could not take a step without the authority of the city, and the bonds, when issued, were to be issued under the signatures of the mayor and clerk, and the seal of the city, as well as on its credit. Now, it would be a contradiction in terms to say that when all these requisites of the law are complied with, as they have been in this case, these were not the bonds of the city, and that this was not a legal obligation of the city of Springfield, because the water commissioners co-operated with the city authorities in the issue of the bonds. But the statute provided that the funds derived from the sale of the bonds were to be exclusively used for the purposes specified in this act, namely: for the creation and continuance of the water-works which were to supply the city with water. And the law also provided that the commissioners should have power from time to time to assess the amounts to be paid for water, and the water rents were to be a lien upon the buildings supplied with water, which water rents

were to pay for the interest and liquidation of these bonds. In other words, there was a special fund raised in a special way, and to be appropriated to a special purpose, under this law. There can be no doubt that this is a debt of the city of Springfield, and for it. If it becomes due and is not paid the city of Springfield is liable, and a judgment can be rendered against the city. But as to how that judgment shall be paid is another question, and may depend upon the particular provisions of law which are applicable to that species of debt, and which it is not necessary now to consider, though it may become necessary, provided a judgment is rendered and the parties for whom it is rendered seek to have it paid. In what manner that shall be done it may be for the court to determine under the various provisions of law. Undoubtedly, an ordinary execution could not issue against the city, but it would probably have to be paid out of the particular fund which was intended to be appropriated by law, under the action of the commissioners, to the debt itself.

The high-school and sewerage bonds I may consider together. As I understand, the charter gives the city the right to borrow money. The charter prescribes what shall be the duties of the city authorities, and what they shall have the right to do—what improvements they shall make, what buildings they may construct, and everything connected with the general welfare of a community like the city of Springfield. It was intended, in other words, by the charter, to clothe the city authorities with all the powers necessary for the welfare, safety, and government of a town or city like Springfield. Certainly, as a part of the duty thrown upon the city authorities, it became proper and right for them to improve their streets, to construct sewers, to build school-houses, and to determine in what manner they should be constructed, how they should be regulated, and everything connected with the management and control of schools and school-houses. Now, this being a part of their duty vested in them by the charter, they are authorized to borrow money. Clearly, they are authorized by the charter to borrow money and to issue bonds for all legitimate purposes connected with the performance of

their duty, whether the construction of school-houses, the payment of the salaries of teachers, the improvement of streets, the building of sewers or bridges. The charter does not limit the power of the city to borrow money to any particular purpose. It does not say that they shall borrow money for this purpose or that only. The clear, reasonable construction of the charter is that the city authorities shall have the right to borrow money for any legitimate purpose, in connection with the authority vested in them by the charter itself. Therefore, I can have no doubt that it was perfectly proper for the authorities to expend money, and to borrow for the purpose of paying for such expenditures; as, for instance, building a school-house of any grade, or making sewers, for such purposes are certainly within the ordinary municipal duties of a city council. The fact that the charter authorizes the city to impose taxes for the construction of school-houses, or sewers, or for the improvement of streets, does not take away the powers of the city also to borrow money for those purposes, and the power to issue bonds still exists, notwithstanding the right to impose taxes for the purpose of building a school-house or constructing sewers.

As to the railroad bonds, I do not see how their validity can be successfully contested. There was authority given to make the subscription, and it was made, and bonds were issued and stock obtained, and, in some instances, voted for, as the proof shows. And as to the necessity, in some of the cases, for a vote by the people in respect to the re-issue of bonds, I do not see that that was necessary, for, it being once admitted that the city authorities had the power to issue these bonds, that, undoubtedly, carried with it the authority to renew the bonds, or to take them up and supply their place with other bonds; and I do not think it can be expected that those who took bonds under such circumstances—that is, re-issued bonds—can be required to look into all the details connected with the manner in which the old bonds had been taken up and the new ones issued. It may be that there were irregularities connected with the issue of new bonds. I am not saying that there were, but suppose that there were.

Still, I do not think that that would render the re-issued bonds invalid.

I have not thought it necessary to take further time for the purpose of giving my general views in relation to the validity of these bonds. If I took more time, and looked into the case more fully, I might go more into detail than I have; but the equity of the holders of these bonds does seem so strong that no court, unless under a sort of moral or legal compulsion, would feel inclined to say, under all the circumstances of this case, that these bonds were invalid. Having been issued for so long a time, the interest on them having been paid, and their validity having been recognized again and again in after years by the city authorities, it does seem as though it is too late now, under all the circumstances of this case, for the city to question their validity. I therefore hold that they are valid, and the city is liable. It has issued the bonds, obtained the money and the benefits it has conferred, and law and equity declare that the debt should be paid.

STEBBINS v. THE BOARD OF COUNTY COMMISSIONERS OF PUEBLO COUNTY.

(Circuit Court, D. Colorado. ———, 1880.)

1. **STATUTE CONSTRUING STATUTE—WHEN VALID.**—A statute construing and explaining a prior statute is valid, in so far, at least, as future transactions are concerned.
2. **STATUTE—RAILROAD—STOCK.**—A statute authorizing counties to take stock in railroads is applicable to a railroad duly organized under a subsequent statute.

———, for plaintiff.

———, for defendant.

MILLER, C. J. The case of Stebbins against the board of county commissioners is submitted, and at Judge Hallett's request I have examined it, and pronounced the result. This is a suit on bonds issued by Pueblo county in aid of a rail-

road called the Pueblo & Salt Lake Railroad, or some such name as that, that were issued in 1874. The defence to them is that the county had no authority to subscribe to stock in any railroad at that time. An act of the territorial legislature of 1868 does authorize counties to take stock in railroad companies, but the argument is, and the plea is, that at that time there existed no law by which any railroad company could be organized in the manner that this company has been organized; that the act of congress of March 2, 1867, impliedly forbade such organization; and probably that is a fair construction of that act. But, by a subsequent act of 1872, congress, as the defendant alleges, undertook to construe that act, and in their construction of it they declare that it should be held to extend to the right to organize railroad companies. It is denied that congress has any right to give a construction to the statute which will bind the court, and therefore that act of 1867 remains, and this railroad has no competent organization which will enable it to take subscriptions to stock. But, in a case which came up concerning taxation under the internal revenue law, which I decided myself in the supreme court, a very similar statute, construing a former statute, is made the subject of consideration, and in that case the court held that, while it might not be true that rights existing prior to the explanatory or declaratory statute will be affected by that declaratory statute, yet, inasmuch as congress or any legislative body has a right to pass a law for the future that such a statute shall be held to mean so and so, while it may not affect past transactions, it is equivalent to the passage of a statute of that character for the future; and, while it is not necessary for us to decide here whether that declaratory statute would affect any contracts or transactions prior to its passage, it is sufficient to say that after its passage it became a part of the law of 1867, and it was a declaration by congress that railroad companies might be organized in the manner that this was organized, after that period. That was passed in 1872, and this corporation filed its certificate of organization in 1873; it therefore was organized after the declaratory act, and, so far as that is

concerned, or any other that I know of, it was a valid organization.

It is said, nevertheless, that the act of 1868, which authorized the counties to take stock in railroads, was wholly void, because this railroad was not organized according to the law as it then stood; but that act of 1868 was a continuing act—was not made with reference to this. There were railroad corporations then in existence to whom it might apply, and it would apply to any future railroad corporation properly organized. Therefore, that act of 1868 authorized the county of Pueblo to subscribe to the stock of a railroad properly organized in 1873; as it did at the time, 1874.

I think, therefore, all the objections taken to the bonds on account of the invalidity of the subscription are ineffectual; and as that is the only question, the demurrer will be sustained, and plea held bad.

An appeal has been taken from this ruling to the United States supreme court.

**WESTERN UNION TELEGRAPH CO. v. KANSAS PACIFIC RAILWAY
Co. and others.**

(*District Court, D. Colorado. —, 1880.*)

1. **RAILROAD—TELEGRAPH FRANCHISE—CONTRACT.**—A railroad, authorized and required by the act of its organization to construct a telegraph line, entered into a contract with a telegraph company for the construction of such line. *Held*, such contract could not be avoided by the railroad company, either as a usurpation of its function or for want of capacity to make it.
2. **SAME—SAME—SAME—ILLEGAL CLAUSE.**—A clause of such contract contained an agreement, upon the part of the railroad company, not to transport men or materials for any other telegraph company at less than the regular rates for passengers and freight, and not to give permission to any such company to erect another line on its lands or roadway. *Held* that, if such clause was void, as in conflict with the act of 1866, aiding the construction of telegraph lines, it could be eliminated from the contract.

3. ~~SAME—SAME—SAME—OFFICERS—RESCISSION.~~—Such contract also provided for the transmission without charge, by the telegraph company, of the *family, private, and social messages of the executive officers* of the railroad. *Held* that, as such free use of the telegraph was not limited to the officers who made the contract, it could be rescinded after the expiration of 13 years.
4. ~~SAME—SAME—SAME—RESCISSION—APPROPRIATION.~~—*Held, further,* however, that such rescission would not authorize either party to appropriate to its own use the joint property of both, acquired under the contract, without paying for the same.

———, for plaintiff.

———, for defendants.

HALLETT, D. J. On the first day of October, A. D. 1876, the Union Pacific Railway Company, eastern division, afterwards known as the Kansas Pacific Railway Company, entered into a contract with the Western Union Telegraph Company relating to the construction and use of a line of telegraph on and along the road of the first-named company. This contract was to continue 25 years. The railway company agreed to pay to the telegraph company the cost of poles, wire, and insulators which had been erected on the line of the road between Wyandotte and Fort Riley, Kansas, and thereafter to furnish material for extending the line as the road should be built westward. The railway company was to furnish the materials and transportation for the line, and the telegraph company was to construct it and keep it in repair. The telegraph company was also to furnish main batteries for operating the line; and, until a second wire should be extended, both companies were to use the first in common. After another wire should be put up by the telegraph company, the first was to remain for the exclusive use of the railway company, and thereafter either company could have wires for its own use, as its business should require, by paying the cost thereof. With this arrangement as to building, maintaining, and operating the line, the railway company was to have free use thereof for its own business, and the telegraph company to use and operate it for business in general, from which a profit might be derived. Each party fulfilled the contract until the line was built to ~~Danver~~; and

thereafter they continued in the use and enjoyment of it until on or about the twenty-seventh day of February last, when the officers of the railway company took possession of the telegraph, and have excluded the telegraph company therefrom ever since that time. To prevent such action the telegraph company filed, in the district court of Arapahoe county, the original bill in this cause against the Kansas Pacific Railway Company and the American Union Telegraph Company, and, on the twenty-sixth of February last, obtained from the judge of that court an order restraining the Kansas Pacific Railway Company from interfering in any manner with the plaintiff's possession of the telegraph line. A writ of injunction was issued out of that court pursuant to such order, and due service thereof made on the officers of the railway company. The latter, assuming to be officers of another corporation called the Union Pacific Railway Company, which was organized about the first of February last by consolidating the Union Pacific Railroad Company and the Denver Pacific Railway & Telegraph Company with the said Kansas Pacific Railway Company, disregarding the writ, took possession of the telegraph line for and in the name of the said Union Pacific Railway Company. The cause was afterwards removed into this court, under the act of congress of 1875, and a supplemental bill was filed, in which the said Union Pacific Railway Company consolidated, and others, were made defendants with the Kansas Pacific Railway Company. In this bill, and upon the argument, the right of the several corporations before mentioned to unite in the manner pursued in organizing the Union Pacific Railway Company, is denied; and it is claimed that the officers of the railway company, whether acting for the Union Pacific Company, assuming that company to have been legally organized, or for the Kansas Pacific Company, were guilty of disobedience to the writ of injunction issued from and out of the district court of the state, for which they should be punished. When that question shall be considered it may become necessary to examine the proceedings of the several corporations looking to consolidation, and to determine whether they are effectual;

and, if the consolidation shall be recognized, then it may become necessary to determine whether the officers of the consolidated company could lawfully disobey a writ directed to one of the companies forming such consolidated company. The argument at the bar was not directed to those questions, but rather to the case made in the supplemental bill to enjoin the defendants from any further use of the telegraph line, except as provided in the contract.

The validity and force of the consolidation is not necessarily involved in the issuance of a new writ, for the consolidated company, if properly organized, can claim no higher or better right than its predecessor, the Kansas Pacific Company. Upon the case made in the supplemental bill, the rights of all parties are referred to the contract, and, accordingly, that instrument has been attacked by defendants upon several grounds, which will now be discussed.

And, first, it is alleged that the railway company, having authority from congress to construct a line of telegraph as well as a railroad, could not delegate such authority to another corporation, charged by law with the duty of constructing a telegraph for the use of the general government and the public. It is said that the railway company could not, by contract or otherwise, substitute another in the performance of that duty. The contract shows that the line was to be built as required by the act under which the railway company was organized, and accepted by the government in fulfilment of that company's obligations, as by the act of congress that company is required to operate its road and telegraph line in a particular manner, and penalties are prescribed for failure therein. 18 St. 112. It is urged that the company must be vigilant in the performance of its duties, and cannot commit into other hands the functions with which it is itself endowed. If, however, all this should be conceded, its relevancy to the present controversy is not apparent. The telegraph company has not assumed to act under or in pursuance of the authority given to the railway company in respect to telegraph lines. It claims to be a corporation organized in the state of New York, with power inherent, to construct and maintain tele-

graph lines in all parts of the country; and it is plain enough that, in constructing the line in controversy, it proceeded in the exercise of such power, real or assumed, and not in virtue of authority derived from the railway company. It is true that, in constructing the line in dispute, the parties intended that it should be accepted by the government in lieu of that which the railway company was required to build. That circumstance may affect the relations of the government to this property, but it does not prove that the telegraph company sought or attempted to appropriate to its own use the railway company's franchise. Acting in its own right, and assuming to have authority in that respect, the telegraph company entered into a contract with the railway company for building a telegraph on the right of way of the railway company; and the latter company, by making such contract, recognized the right and authority which the former company then assumed to have. As between the parties, the contract thus made may be and should be considered without reference to the power conferred on the railway company in respect to a telegraph. Independently of that authority, the railway company could contract with any telegraph company in respect to the lines of the latter on its right of way. For convenience in constructing and maintaining these, as well as to secure a direct course, the telegraph lines of a country are usually built along the lines of railway; and the railway companies have no necessary relation to them except as common carriers; that is to say, they carry the material for building and repairing them, and the men who do the work. In some instances the railway company owns and operates the telegraph, and in others it has an interest in the line, by which the use of it is secured. But these circumstances are entirely conventional, and no reason is perceived for denying to a railway company the right to contract for a dozen lines of telegraph on its right of way with as many different telegraph companies; and the circumstance that the railway company has power inherent to construct a telegraph for itself, is not at all controlling on this point. It may have its own telegraph, and contract with other companies for additional lines to any

extent. In that case the right of one company as against the railway company would not depend in any degree upon the relations of the latter with other companies, or with the power that created it. In ascertaining such right we should look only to the contract between the parties, disregarding the relations of each with other parties as *res inter alios acta*. So, in this case, the controversy is not whether the Kansas Pacific Railway Company has constructed a line of telegraph as required by its organic law, or has discharged any of its duties to the government. That is a question which concerns the government only, and which cannot arise between these parties, unless, indeed, it should be alleged that the contract has been violated in respect to the service to be rendered to the government. In some incidental way the question might come to the surface upon a charge of a breach of contract, but that is not made in this record, and therefore the question is not presented in that aspect. Properly understood, the question at issue is whether the contract between these parties shall be avoided on the ground that the telegraph company has usurped a function of the railroad company, or for want of capacity in the latter to make it. Upon that question I am of the opinion that the objection is without foundation.

It is also objected that the fifth clause of the contract is in restraint of trade, and against public policy. In that clause the railway company agrees not to transport men or materials for any other telegraph company at less than the regular rates for passengers and freight, and not to give permission to any such company to erect another line on its lands or roadway. This stipulation appears to be in opposition to the act of congress of 1866, to aid in the construction of telegraph lines, (14 St. 221,) and perhaps it is, for that reason, without effect; but, if that view shall be accepted, that paragraph may be eliminated from the contract without impairing other provisions of the same instrument.

The contract is peculiar, in that the acts to be done by the parties respectively, towards maintaining the line for their joint use, are obviously the essential feature of the agreement.

Casting out the fifth paragraph, the contract is not affected in respect to consideration. 2 Chitty's Contracts, 1001; 2 Parson's Contracts, 505. If, however, that paragraph is not obnoxious to the last-mentioned statute, it is not otherwise open to criticism. By its terms other companies may have men and materials transported over the railway at the usual rates, and a telegraph line may be built on other lands as well as those belonging to the railway company. Counsel will find a very good opinion on that point in 7 Bissell, 367. So, also, it may be said that a restrictive stipulation in a contract is without force, where, as in Colorado, the law provides for condemning lands for the use of a telegraph. If the railway company should refuse to allow another telegraph company to build on its lands because it has agreed with the plaintiff so to do, or for any other reason, the law will open the way for such other companies when thereunto requested.

The authority of the railway company over its right of way and its title thereto, as whether absolute or less, does not arise in this discussion. What has been said must be regarded as referring to the company's interest in the way, as against telegraph companies, whatever that interest may be.

A third objection to the contract is founded on the fourth paragraph, which provides that the business of the railway company, and the *family, private, and social messages of the executive officers* shall be transmitted without charge between all stations on the line of said railway, and also between all such stations and the city of St. Louis, Missouri, and elsewhere in the United States, over all other lines of the telegraph company, with certain limitations therein specified. In so far as this relates to the free use of the lines of the telegraph company by the officers of the railway company, in respect to their private affairs, no attempt has been made to sustain it. That the contract was made by and on behalf of the railway company, and that the consideration for all the promises of the telegraph company, including that which relates to the transmission of messages, is furnished by the railway company, is too plain for argument; and it must be conceded that the officers of the railway company, in securing to themselves

personally the use of the telegraph, which was of some value, used the corporate property for their own advantage, and thus abused the trust committed to their charge. We may acquit them of any intent to wrong their company, and say that the stipulation is an expression of courtesy on the part of the telegraph company towards those with whom they were intimately associated in business. In civility to each other officers of corporations may surpass the interests of their constituents in a manner which cannot be sanctioned by the law; and it should never be said that the obligations of civility and courtesy, as known and recognized among officers of corporations, may be framed into contracts to bind their principals. To trust so much to the exuberance of generous hearts would seriously endanger corporate property. Read it as we will, the contract secures to the officers of the railway company the free use of the telegraph in respect to their private affairs, and no explanation can be made that will break the force of that statement. That the privilege thus secured was of some value, will not be denied; and the fact that the officers could not have been induced to accept the like value in any other form is of no weight. To insert such a stipulation in the contract was a misuse of the corporate property for which the contract itself may be avoided. Field on Corporations, 174. As already stated, however, the railway company did not disaffirm the contract, but proceeded in the execution of it until recently, a period of more than 13 years. In most cases ratification would be implied from such use and enjoyment, and the contract would have become irrevocable. Such would be the rule if the free use of the telegraph had been limited to the officers who were concerned in making the contract; but the provision extends to all officers of the company, as well those who were to come after as those who made the contract, and thus it is kept alive by continuous feeding. In this, as in other respects, the contract appears to stand upon continually-recurring acts of the parties. The railway company can hardly be charged with negligence in failing to repudiate an agreement which continually sup-

plied its officers with reasons for keeping silent; and so we must say that the railway company is still at liberty to rescind the contract if it wishes to do so; but rescission does not mean that either party may appropriate to its own use the joint property of both, acquired under the contract, without paying therefor. 2 Chitty's Contracts, 1089*n*. In so far as the contract has been executed both parties are bound, and the right of each in the property acquired pursuant to its provisions must be respected. The seizure of the line on the twenty-seventh of February, by the railway company, was clearly as illegal as if the contract were free from objections. Whether there is any means by which either party may acquire the interest of the other in the property in controversy is not a question now presented for consideration. Nor is it necessary to ascertain what interest each party has in the telegraph line. It is enough that the property is owned by the parties to the contract jointly, and that the railway company has wrested the possession from its associate without warrant or authority of law. The parties must be restored to the position in which they were before the seizure, and for that purpose the injunction will be allowed.

NOTE. See *Western Union Telegraph Co. v. Union Pacific Railway Co.* 3 FED. REP. 721.

UNITED STATES *v.* HART.

(*Circuit Court, W. D. Tennessee.* ———, 1880.)

1. SUCCESSION TAX—CONSTRUCTION OF A DEED—ADEQUATE CONSIDERATION.—A deed from a mother to her sons conveying land "for and in consideration of love and affection, and the further consideration of the assistance they have rendered me since the death of my husband," is not a deed of gift made without valuable and adequate consideration, so that the grantees take a succession subject to a tax, within the meaning of the act of June 30, 1864. Section 132, 13 St. 288.

W. W. Murray, for plaintiff.

Harris & Turley, for defendant.

HAMMOND, D. J. This case is submitted for the construction of a deed from Nancy Boon to her sons, whereby she conveys to them a tract of land "for and in consideration of the love and affection that I have for my sons, and the further consideration of the assistance they have rendered me since the death of my husband." There is no proof obtainable of the character of the assistance rendered by the sons, nor of the extent of it, but it is agreed by the parties that if the deed on the face of it imports a deed of gift without valuable and adequate consideration, the grantees took a succession liable to the tax imposed by the internal revenue act of June 30, 1864, (13 St. 288,) and the United States is entitled to recover the land in this action of ejectment against the defendant in possession.

The succession tax cannot be defeated by reciting a nominal consideration which would be deemed valuable in the technical sense of that term, for the act of congress says the consideration must not only be valuable but *adequate*. Chancellor Kent says that notwithstanding the high moral obligation of a child to support a parent, there is no legal obligation to do it. 2 Kent. 208. And while it is true that the law implies no promise on the part of the parent to pay for necessities, and in the absence of a contract to do so will not presume one, there is no doubt that such a contract may be a valuable and adequate consideration to support a deed of bargain and sale. *Lynn v. Lynn*, 29 Pa. St. 369; *Keeler v. Baker*, 1 Heisk. 639.

I think it is plain, from the recital of this deed, that there was some other consideration than bare love and affection, and, in the absence of proof to the contrary, the recital of it imports that it was, in the sense of the law, sufficiently valuable and adequate to take the case out of the category of a deed of gift. If the recital of the further consideration appeared on the face of it to be *nominal* only, the ruling would be otherwise; but it does not so appear. The assistance may have been of a kind which would find no adequate compensation in the transfer of this land, or it may have been very slight. The grantor seems to have appreciated it, and, in the

absence of exact knowledge, we cannot say that it was only nominal, or only necessities for which she was not bound to pay.

Judgment for the defendant.

MACK & Co. v. McDANIEL.

(Circuit Court, E. D. Arkansas. October, 1880.)

1. ATTACHMENT—REMOVAL OF PROPERTY OUT OF THE STATE—ARKANSAS STATUTES.—A statute in Arkansas declares a creditor may have an attachment against his debtor who "is about to remove, or has removed, his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claim of said defendant's creditors."

Held, that a merchant who did not have property enough to pay his debts, and who invested a material portion of his assets in cotton and shipped it out of the state, was liable to attachment under this statute; that the plaintiff did not have to show the removal was made for a fraudulent purpose; and that the fact that the shipments of cotton out of the state were usual and customary with the defendant and with merchants generally doing business in the state, constituted no defence to the attachment.

Attachment.

The plaintiff sued out an attachment against the property of the defendant. The affidavit for the attachment was based on the sixth subdivision of section 388, Gantt's Digest, which declares the plaintiff may have an attachment against his debtor who "is about to remove, or has removed, his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim, or the claim of said defendant's creditors."

The defendant filed an affidavit denying the grounds of attachment. On the trial of this issue it was shown that the defendant was a retail merchant, doing business at Arkadelphia, in this state; that at and before the time the attachment was sued out he was insolvent, and wholly unable to pay his debts; that his property consisted chiefly, if not alto-

gether, of a small stock of goods and accounts and notes; that for some time before and up to the date the attachment was sued out the defendant was converting his goods and credits into cotton, and shipping this cotton out of the state. Within 60 days immediately preceding the date of the attachment, a large and material portion of his property was thus converted into cotton and the cotton shipped out of the state, and at the time, and after this cotton was shipped, the defendant did not have property enough in the state to pay his debts, or the debt of the plaintiffs, which was overdue, and was for goods purchased, and which the defendant had declined to pay or secure for want of ability to do so.

It was further shown that it was the custom of merchants to sell goods for cotton and receive payment of debts due them in cotton, and to ship such cotton out of the state in the ordinary course of their business; and that the purchase and shipment of the cotton by the defendant was in the usual course of his business as previously conducted.

Eben W. Kimball, for plaintiffs.

F. W. Compton and *J. M. Moore*, for defendant.

CALDWELL, D. J., (*charging jury*.) Counsel for defendant have argued with earnestness and ability that the shipment of cotton out of the state by the defendant, though such cotton constituted a material part of his property, and though he may not have had left in the state enough property to satisfy his debts, is not a removal of his property out of the state within the meaning of the statute, because such shipment was made in the usual course of business of the defendant, as a merchant, and was in accordance with the usual course of business of merchants generally in this country.

It is conceded that the shipment of cotton in this way is in accordance with the usual custom of merchants. Undoubtedly a merchant who pays his debts, or has property enough left in the state to pay his debts, may convert a part or all of his capital invested in his business into cotton, and ship it out of the state, and he is not liable to attachment under this section. Such a merchant is not within either the letter or spirit of the statute. But because a solvent merchant who

pays his debts, or has property enough outside of his investments in cotton to pay his debts, may do this, does it follow that an insolvent merchant who does not pay his debts, and has not property enough left in the state to pay them, may invest his means in cotton, and remove it out of the state, when such cotton constitutes a material part of his property?

Confessedly, the latter case falls within the very letter of the statute; and why not within its meaning and spirit? A construction that would place the solvent merchant in such case on the same plain with the insolvent merchant would nullify the statute, and that, too, not in the interest of merchants conducting their business according to the recognized rules of commercial business and integrity, but in the interest of that class who either will not or cannot comply with the plainest obligations imposed on merchants by law and sound mercantile usage.

It does not lie in the mouth of a merchant who is unable to pay his debts, and who refuses either to pay or secure his commercial paper, and who has not property in the state sufficient to pay his debts, to say that because a solvent merchant may ship his cotton out of the state, that therefore he may do the same, although it may constitute a material part of his property. If a merchant in such a plight may do this, he may continue the process until the last dollar's worth of his property has assumed the shape of cotton and been shipped out of the state. In such a case a creditor is not, under our statute, bound to stand by and be compelled to take the risk of the proceeds of such property returning to the state, and all other risks incident to such business.

It would not do for a court to say that an insolvent merchant who refuses to pay or secure his creditors for a want of ability to do so, is carrying on business as merchants usually do. Such a man ceases to be a merchant in the proper acceptance of that term. He does not comply with his legal obligations, nor conform to sound commercial usage and custom in the conduct of his business and in his dealings with his creditors, and has no right, therefore, to demand that the

law and his creditors shall treat him in the same manner that a solvent merchant doing business regularly as merchants usually do would be treated. He cannot repudiate the duties and obligations imposed on him as a debtor and merchant, and at the same time claim the legal rights accorded to a debtor who discharges, or is willing or able to discharge, his obligations to his creditors.

While the single fact of insolvency of a merchant is not ground of attachment, there certainly is nothing in the law or sound public policy to encourage insolvent men to conduct a commercial business where it is obvious that such business can only be carried on at the expense of unsuspecting or victimized creditors. If an insolvent man will conduct business as a merchant he cannot, on any pretext, remove a material part of his property out of the state without rendering himself liable to the process of attachment. An insolvent debtor may make a *bona fide* sale of all or any portion of his property within the state, but when he sends a material portion of his property out of the state for sale or on speculation for his own account, he renders himself obnoxious to process under this statute. Insolvent merchants have no greater privileges under this statute than any other insolvent debtor. Every debtor who removes his property or a material part of it out of the state, not leaving enough to satisfy the claims of his creditors, is within the statute, whether he be a merchant, farmer, or lawyer, and whether the property so removed be cotton, cattle, horses, or any other kind of movable property. And the mode in which the debtor acquired the property can make no difference. Nor is the motive for the removal material. The law does not require that the removal shall be made with a fraudulent intent or for a fraudulent purpose. There is nothing unreasonable or harsh in this rule, for an insolvent man has no legal or moral right to insist on the privilege of putting his diminished and insufficient assets to the hazards of shipment beyond the state, when it was obvious all risks incident to such action have to be taken and borne by his creditors.

No general rule of interpretation can be framed applicable

to every state of case that may arise under this statute; and it would not be proper or safe to enumerate supposed cases that would be within or without the statute.

It is sufficient to give the jury an exposition of the statute applicable to the facts of this case. Other cases depending on a different state of facts will be decided when they arise. The jury are therefore instructed that if they find, from the evidence, that the defendant owed the plaintiffs the debt sued for in this action, and that it was due, and that the defendant was in the habit, in the course of his business as a merchant, of investing his capital and credit in cotton, and shipping the same out of the state, and that the cotton thus shipped within a period of about 60 days, immediately preceding the date of the writ in this case, constituted a material portion of the defendant's property, and that after such shipment the defendant did not have enough property left in the state to satisfy his debts, then the attachment was rightfully sued out, without reference to the motive or intention of the defendant in shipping such cotton. But if the cotton so shipped did not constitute a material portion of his property, or if he had property left in the state after its shipment sufficient to satisfy his debts, then the issue must be found for defendant.

Verdict and judgment sustaining the attachment.

NORTHERN PAC. R. CO. *v.* B. & M. R. CO. and others

(Circuit Court, D. Minnesota. ———, 1880.)

1. INJUNCTION—ATTEMPT TO TAKE PERMANENT POSSESSION OF LAND FOR PUBLIC USE—IRREPARABLE INJURY.—An attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction would ordinarily be granted.

Held, in this case, that the equities of the bill were not fully denied by the answer, and a motion to dissolve the injunction could not therefore prevail.

Motion to dissolve preliminary injunction.

Gilman & Clough, for plaintiff.

Bigelow, Flandrau & Clark, for defendants.

NELSON, D. J. It is well settled that the attempt to take permanent possession of land for public use, without the assent of the owner, express or implied, and without payment or tender of damages in advance, would, if consummated, be in the nature of an irreparable injury, to prevent which an injunction will ordinarily be granted. See *High on Injunctions*, § 391; 30 Wis. 107; 2 Dillon, 376.

The answer of defendants does not deny that such attempt was made, and the allegations of the bill in that respect are not fully met, so as to warrant the enforcement of the general rule, that when all the equities of the bill are fully denied by the answer the injunction must fall.

The charter of the Northern Pacific Railroad Company (section 7) authorizes the company to enter upon any land necessary for the construction and working of its road, not to exceed 200 feet in width on each side of the line; and in case the owner of the land and the company cannot agree as to the value of the premises taken, provision is made for an appraisal to be initiated by *either party*. Usually the railroad company only is authorized to commence proceedings. When the company, under such a charter, takes possession of land for construction before proceedings are commenced to ascertain the compensation to be paid, it is not a trespasser, and an injunction even would not be allowed to prevent the construction of its road. *Mills on Eminent Domain*, § 90, and authorities cited. This rule, however, would not prevail where the right of eminent domain is granted to corporations by the legislature of a state whose constitution requires compensation to be first paid or secured before the property is taken.

The right of eminent domain is conferred upon the plaintiff by congress under the constitution of the United States. The state of Minnesota assented to the right to so exercise it. See act of Minnesota legislature of March 2, 1865.

Under the constitution of the United States just compensation, where private property is taken for public use, is not

in terms required to be made before entry. Authorities are numerous that the party condemning may thus enter even where no right is given by the charter to the owner to initiate proceedings for assessment of damages.

But I think the facts in this case, aside from the law as laid down, show a waiver of payment in advance of the entry and construction of the road by Edward Schriber, the owner, and his heirs. The route of the Northern Pacific Railroad Company was finally located over the *locus in quo* November 21, 1871. Edward Schriber purchased it in the month of January previous from the government. The railroad was constructed in the summer of 1872. There was no person living upon the premises at the time, and it was uncultivated. The land being vacant at the time of entry by the plaintiff, on the definite location of the route, and the owner residing in the state of Pennsylvania, would not the clause in the company's charter, which authorizes it to enter upon vacant and unoccupied land, justify the entry? But conceding it would not, yet, when the entry was made, and the road in operation, an acquiescence for the shortest period is sufficient to warrant a belief that the owner intends to waive all claims except, perhaps, for the damages, which could be assessed as well after as before entry. Certainly the earliest notification to the company, according to the averments of the answer, was long after the construction by the plaintiff of its road over the land, and, though it is alleged in the answer that neither Edward Schriber in his life-time, nor his heirs, knew until 1873 that the plaintiff had constructed its road over this land, still, up to the time of the conveyance of their interest in the strip which crosses the Northern Pacific Railroad, in 1880, they only notified the plaintiff that they held it responsible for the trespass and use of the land, and have never commenced any proceedings to assert their rights.

The plaintiff has been in possession of the land since November, 1871, and operating its road since 1872. Under such circumstances a license is implied.

It is conceded by defendants' counsel that the Barnesville & Moorhead Railroad Company, as owner of a strip purchased

from Schriber's heirs, running across complainant's track, and the land necessary for operating its road, could not maintain ejectment. If the company is not a trespasser, and cannot be ousted by ejectment, and an injunction would not issue, it has a right of property as well as a license. Its title would be complete and perfect on the payment of compensation when ascertained.

The plaintiff insists that the right to compensation is barred under section 7 of its charter, through default of Schriber or his heirs to claim such compensation within six years after the opening of its road, and authorities are not wanting to sustain this view, (1 Redfield on Railways, 300, and note;) but it is not necessary to decide this now. Conceding the right to enforce a claim for compensation, the plaintiff still has a property interest which can only be taken by the defendants deriving title with knowledge of the situation, on strict compliance with the law of Minnesota. The law does not authorize either party to initiate proceedings to condemn; it allows only the one desiring the land.

No award has been made—no compensation ascertained. Unless consent or license was given to defendants to enter upon the plaintiff's right of way and track, and construct the crossing, in view of the constitution and laws of Minnesota by virtue of which only can it exercise the right, damages must first be appraised and paid or secured previous to entry. See Cooley's Constitutional Limitations, title, "Eminent Domain;" 30 Wis. 105; 35 Mich. 265,—the latter a railway-crossing case.

No damages having been appraised, has permission or license been granted so as to prevent the plaintiff from resisting the occupancy of its land and track for that purpose?

The amended answer of defendants sets up a license to make a crossing over plaintiff's track, given by it, and alleges that the plaintiff, also, by representations encouraged the building of defendants' road, and gave it to understand that it would assist in effecting the crossing, and interpose no objections thereto. The answer is sworn to by R. B. Angus, James J. Hill, and A. B. Stickney; and an affidavit

sworn to by R. B. Angus, which was read on the hearing of the original application for injunction, purports to give in some detail what these representations were, and he says H. E. Sargent, the plaintiff's general manager, knew that the defendants intended to cross plaintiff's line, and made no objection to the manner or the point at which said crossing was to be made, but at his own request was furnished by the defendants' chief engineer with a description of said proposed crossing, and a diagram and model of a frog which would be required at said point, and that said Sargent then agreed and promised to construct said frog at the shops of said plaintiff at Brainerd, in this state.

The affidavits of the president and secretary of the company, and of the general manager, denying any consent to the intended crossing, are read in reply, and a copy of a letter written by one of the defendants, Stickney, superintendent of construction of the Barnesville & Moorhead Railroad, dated September 3, 1880, and addressed to H. E. Sargent, general manager of the Northern Pacific Railroad, is also produced, purporting to enclose a tracing of the proposed crossing, with a request that the crossing frogs should be made at the plaintiff's shops and charged to the Barnesville & Moorhead Railroad Company; also a copy of a letter, dated September 9, 1880, addressed to J. J. Hill, general manager of the St. Paul, Minneapolis & Manitoba Railway, and one of the principal officers of the Barnesville & Moorhead Railroad Company, by Sargent, stating that in the matter of the Barnesville & Moorhead line crossing the Northern Pacific near Moorhead, "I am directed to forbid your doing so, or entering the Northern Pacific Railroad Company's right of way, which is a strip 200 feet wide on each side of the main track."

This was certainly a formal revocation of any parol license to enter upon the Northern Pacific track or right of way, conceding that consent or license was given, which is very doubtful. Again, the power of the general manager of the Northern Pacific Railroad to bind the company in a matter of this kind is not clear, but if he could grant such license, as is claimed by defendants, still the law is well settled that a

parol license can be revoked before acted upon, which is the case here. *Bigelow on Estoppel*, 227-8; 28 N. Y. 297; 1 Selden, 568.

I am satisfied upon consideration of the case, after the full and able argument of counsel on both sides, that the motion to dissolve the injunction must be denied, and it is so ordered.

In re FOWLER.

(Circuit Court, S. D. New York. ———, 1880.)

1. EXTRADITION—EVIDENCE—ACT OF JUNE 19, 1876, (19 U. S. ST. AT LARGE, 597)—REV. ST. § 5271.—The act of June 19, 1876, (19 U. S. ST. at Large, 597,) amending section 5271 of the Revised Statutes, relating to cases of extradition, provides: "In every case of complaint and of a hearing, upon the return of a warrant of arrest, any depositions, warrants, or other papers offered in evidence shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended by the tribunals of the foreign country from which the accused party shall have escaped; and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officers of the United States resident in such foreign country shall be proof that any such deposition, warrant, or other paper, or copy thereof, is authenticated in the manner required by this section." *Held*, that this section as thus amended provides for two classes of documentary evidence—*First*, original depositions, original warrants, and original "other papers;" *second*, copies of "any such depositions, warrants, or other papers."
2. SAME—ORIGINAL DOCUMENTS—AUTHENTICATION.—*Held, further*, that the first class, the originals, must be documents which would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect to the offence charged against him as committed there, if the inquiry as to his criminality in respect of such offence were being had in such foreign tribunals; and such originals must be authenticated in such a proper and legal manner as would entitle them to be received as such evidence in such foreign tribunals.

3. **SAME—COPIES—AUTHENTICATION.**—*Held, further*, that the second class, the copies, must be copies of original documents, which originals would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect to the offence charged against him as committed there, if the inquiry as to his criminality in respect of said offence were being had in such foreign tribunals, and such copies must be "authenticated according to the law of such foreign country;" that is, authenticated as true copies of such originals, the authentication being made according to the law of the foreign country.
4. **SAME—AUTHENTICATION—PROOF.**—*Held, further*, that there was nothing in the statute which made the certificate of the United States diplomatic or consular officers the only competent proof that either the originals or the copies were authenticated in the manner required by the statute.
5. **SAME—SAME—SAME.**—*Held, further*, that the original papers might be authenticated by oral proof.
6. **SAME—SAME—SAME.**—*Held, further*, that there was nothing in the statute which necessarily excluded the authentication of the copies by oral proof, or excluded oral proof as to what the law of the foreign country was as to such authentication, or oral proof that such oral authentication was according to the law of the foreign country.
7. **HABEAS CORPUS—QUESTION OF FACT—DECISION OF COMMISSIONER.**—The decision of a United States commissioner as to the fact of the criminality of the accused, in a case of extradition, cannot be reviewed by the circuit court on a writ of *habeas corpus*.

Habeas Corpus.

Edward Heaton, for relator.

Francis I. Marbury, for the British Government.

BLATCHFORD, C. J. This case is before the court on *habeas corpus*, in proceedings for extradition brought before this court by a *certiorari*. On a complaint made before Commissioner Osborn by the consul general of Great Britain, at New York, that the relator, George Fowler, *alias* R. Gray, had, on the eighteenth of September, 1880, at Bradford, in England, committed the crimes of forgery and the utterance of forged paper, by feloniously forging and uttering, knowing the same to be forged, a check or bank draft dated at Bradford, on that day, for £10 sterling, payable to the order of W. Jowett, and purporting to be drawn by said Jowett on the Bradford Banking Company, limited, and indorsed by said

Jowett, with intent thereby to defraud said Jowett, or said company; that said Fowler had, on said day, at Bradford, feloniously forged, and afterwards feloniously uttered, knowing the same to be forged, a check or bank draft dated Bradford, September 18, 1880, for £50 sterling, payable to the order of W. Jowett, and purporting to be drawn by said Jowett on said company, and indorsed by said Jowett, with intent thereby to defraud said Jowett or said company, and which complaint set forth the other necessary matters, the said commissioner issued the proper warrant for the arrest of said Fowler, with a view to his extradition under article 10 of the treaty of August 9, 1842, between the United States and Great Britain, (8 U. S. St. at Large, 576.) The relator was arrested and brought before the commissioner, and, as the result of the hearing, the commissioner decided that the evidence was sufficient to sustain the charge, and he committed the relator to the custody of the marshal to await a warrant of surrender.

In the course of the hearing before the commissioner, certain documentary evidence was offered by the prosecution, and admitted under the objection of the relator. There is a copy of an information and complaint sworn to by Jowett, September 21, 1880, at Bradford, before a justice of the peace there, charging Fowler with having feloniously forged and uttered the banker's checks for £60 sterling, with intent to defraud. Such copy is certified by Angus Holden, a justice of the peace at Bradford, to be a true copy of the original information. On the back of the copy is a certificate by Godfrey Lushington, assistant under secretary of state for the home department, certifying that the signature of Holden is the signature of a magistrate in England, having authority to take the information, and that the information "so verified by a magistrate, when the same was taken and authenticated by a minister of state, and sealed with his official seal, would be received as evidence of the criminality of a fugitive criminal from the United States charged before a tribunal in Great Britain with an extradition crime under the extradition treaty as existing between that country and the United States."

Under said certificate is a certificate by T. V. Lister, assistant under secretary of state, sealed with the seal of the foreign office, certifying that Lushington's said signature is the handwriting of Godfrey Lushington, assistant under secretary of state for the home department. Under said two certificates is a certificate by J. R. Lowell, envoy extraordinary and minister plenipotentiary of the United States of America, made at the legation of the United States, London, under the seal of the legation of the United States of America to Great Britain, certifying that Lister's said signature is the handwriting of G. V. Lister, "one of the assistant under secretaries of state for foreign affairs, and that the annexed documents are authenticated in the manner required by the statutes of the United States."

There is also a copy of a warrant, issued at Bradford, September 21, 1880, by a justice of the peace there, reciting said information, and commanding the constables of Bradford to arrest Fowler, and bring him before a justice of the peace to answer said information. This copy is certified by Angus Holden, a justice of the peace at Bradford, to be a true copy of the original warrant.

On the back of the copy is a certificate by said Lushington of the same tenor, *mutatis mutandis*, as his certificate on the back of the copy of the information. Under said certificate is a certificate of Julian Pauncefote, assistant under secretary of state of foreign affairs, sealed with the seal of the foreign office, of the same tenor as the said certificate of said Lister. Under said two certificates is a certificate by Mr. Lowell, made at the legation of the United States, London, under the seal of the legation of the United States to Great Britain, certifying that Pauncefote's said signature was the handwriting of Sir Julian Pauncefote, "one of the assistant under secretaries of state for foreign affairs, and that the annexed documents are authenticated in the manner required by the statutes of the United States." There are, also, an original deposition of William Jowett, and an original deposition of Edwin I. Hustler, signed by them respectively, and sworn to at Bradford, September 30, 1880, before W. Pollard, a justice of the peace

there, in reference to said forgeries. These depositions bear certificates of the same character, from the home department, and the foreign office, and the United States legation, as those certifying the copies of the information and the warrant.

The second section of the act of August 12, 1848, (9 U. S. St. at Large, 302,) provided as follows: "In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any such foreign country may have been granted, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended." This was a narrow provision. It allowed in evidence here, not any original depositions on which a warrant abroad issued, not any original depositions used abroad on the hearing of the charge after an arrest under the warrant, not any copies of the latter depositions, not such original warrant, not a copy of it, not any other original paper, or a copy thereof, but only copies of the depositions abroad on which the warrant abroad issued, and then it required such copies to be certified in a particular way, and to be attested by a particular oath.

Then followed the act of June 22, 1860, (12 U. S. St. at Large, 84,) which provided as follows: "In all cases where any depositions, warrants, or other papers, or copies thereof, shall be offered in evidence upon the hearing of an extradition case," under the second section of the act of 1848, "such depositions, warrants, and other papers, or copies thereof, shall be admitted and received for the purposes mentioned in the said section, if they shall be properly and legally authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by this act."

It was held by this court, in *In re Heinrich*, 5 Blatchf. 414, that the act of 1860 enlarged the class of documentary evidence which might be adduced in support of the charge of criminality, by providing for the admission of *any* depositions, warrants, or other papers, or copies of the same, authenticated as specified in the act of 1860.

Then came the Revised Statutes, § 5271 which, as it stood until 1876, provided as follows: "In every case of complaint and of a hearing, upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be reviewed for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any paper or other document so offered is authenticated in the manner required by this section."

In *In re Stupp*, 12 Blatchf. 501, before this court in 1875, it was held that section 5271 was in force in lieu of the act of 1848, in regard to copies of the depositions on which an original warrant of arrest was granted abroad, but that the act of 1860 was still in force, after the enactment of the Revised Statutes, in regard to the admission in evidence of all depositions, warrants, and other papers, or copies thereof, except the copies mentioned in section 5271. In consequence of a suggestion made in the case of *Stupp* that section 5271 had changed the law in regard to copies of the depositions on which an original warrant was issued abroad, instead of re-enacting it, and that the act of 1860 had not been re-enacted in the Revised Statutes, the act of June 19, 1876, (19 U. S. St. at Large, 597,) was passed. That act amends section 5271 so as to read as follows:

"In every case of complaint and of a hearing, upon the re-

turn of a warrant of arrest, any depositions, warrants, or other papers offered in evidence shall be admitted and received for the purpose of such hearing, if they shall be properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended by the tribunals of the foreign country from which the accused party shall have escaped; and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officers of the United States resident in such foreign country shall be proof that any such deposition, warrant, or other paper, or copy thereof, is authenticated in the manner required by this section."

The provisions of section 5271, as thus amended, do not appear to have been construed in any adjudged case. The section provides for two classes of documentary evidence—*First*, "depositions, warrants, or other papers," which means original depositions, original warrants, and original other papers—the depositions, warrants, and papers themselves, and not copies of them; *second*, copies of "any such depositions, warrants, or other papers." The first class, the originals, must be documents which would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect to the offence charged against him as committed there, if the inquiry as to his criminality in respect of such offence were being had in such foreign tribunals, and such originals must be authenticated in such a proper and legal manner as would entitle them to be received as such evidence in such foreign tribunals. The second class, the copies, must be copies of original documents, which originals would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offence charged against him, as committed there, if the inquiry as to his criminality in respect of said offence were being had in such foreign tribunals, and such copies must be "authenticated according to the law of such foreign country;" that is, authen-

ticated as true copies of such originals, the authentication being made according to the law of the foreign country.

When originals are offered they must be satisfactorily identified, and it must appear that they would be entitled to be received in the tribunals of the foreign country as evidence of such criminality, if the inquiry as to such criminality were being had in such foreign tribunals. When copies are offered it must appear that the originals of them would be entitled to be received in the tribunals of the foreign country as evidence of such criminality, if the inquiry as to such criminality were being had in such foreign tribunals, and it must appear that the copies are true copies of such originals, and the authentication that the copies are true copies must be made according to the law of the foreign country. There would seem to be a distinction industriously made, in the section, between originals and copies. If copies had been intended to be placed in the same category with originals, the words "or copies of any such depositions, warrants, or other papers" would naturally have been inserted after the words "or other papers," where the latter words first occur; and the portion of the section after the word "escaped," to and including the word "evidence," would have been omitted. The inference is that a different meaning may be looked for in the expression "properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped," from that which is to be looked for in the expression "authenticated according to the law of such foreign country."

In Webster's Dictionary "authenticate" is defined thus: "To render authentic; to give authority to, by the proof, attestation, or formalities required by law, or sufficient to entitle to credit." In Worcester's Dictionary "authenticate" is defined thus: "To prove authentic." In Bouvier's Law Dictionary "authentication" is defined thus: "A proper or legal attestation. Acts done with the view of causing an instrument to be known and identified." In Burrill's Law Dictionary "authentication" is defined thus: "The act or

mode of giving legal authority to a statute, record, or other written instrument, or a certified copy thereof, so as to render it legally admissible in evidence." There does not appear to be any necessary or inherent meaning in the word "authenticated," as used in the section which requires the authentication to be in writing. The connection in which the word "authenticated" is used, in this or any other statute, may require the authentication to be in writing, and it may, in one place, mean only a written authentication, while in another place it may admit of an authentication not in writing.

The words "properly and legally authenticated, so as to entitle them to be received as evidence," etc., are properly to be construed as if the expression were "so properly and legally authenticated as to entitle them," etc.; that is, "so properly and legally authenticated that they would be entitled to be," etc. This authentication, in regard to original papers, may be made by oral proof given here. A witness may swear here to the verity and identity of the original; and, also, from his knowledge and experience, that they would be received in the tribunals of the foreign country as evidence of the criminality of the person in respect to the offence charged against him as committed there, if the inquiry as to such criminality were being had in such foreign tribunals. This will be sufficient, under the statute, when originals are offered. When copies are offered they must be authenticated according to the law of the foreign country. The provision that "the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any such deposition, warrant, or other paper, or copy thereof, is authenticated in the manner required by this section," provides for a mode of proof in regard to both originals and copies, and in regard to both of the authentications mentioned in the section. Such certificate, if in proper form, is absolute proof, whatever may be the tenor of the certificates of foreign officials to the same documents.

Practically, there may, ordinarily, be no adequate attainable means, other than such certificate, of proving that the authentication of the copies is according to the law of the for-

sign country. But there is nothing in the statute which necessarily excludes oral proof authenticating the copies, or oral proof as to what the law of the foreign country is as to such authentication, or oral proof that such oral authentication is according to the law of the foreign country. There is nothing in the statute which makes such certificate of the United States diplomatic or consular officers the only competent proof that either the originals or the copies are authenticated in the manner required by the statute. Whether the originals are offered, or copies are offered, it must appear that the originals would be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect of the offence charged against him as committed there, if the inquiry as to such criminality were being had in such foreign tribunals. Not only is the provision as to that effect specific as to the originals, but the provision in regard to copies is, twice, that they are to be copies of "such" originals; that is, copies of originals which would be received in the tribunals of the foreign country as such evidence.

The certificate of Mr. Lowell in this case cannot be held to be in compliance with the statute. It certifies that the documents "are authenticated in the manner required by the statute of the United States." It ought to certify, in respect to the original depositions offered, that they are properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person apprehended by the tribunals of Great Britain; and it ought to certify, in respect to the copies offered, that the originals of which they are copies would be received as such evidence, and that such copies are authenticated according to the law of Great Britain. Not only is the certificate of Mr. Lowell thus defective, but it clearly appears, from the authentications to which his certificates are appended, that the documents are not authenticated in the manner required by the statute of the United States. In each of the three certificates of Mr. Lushington he certifies that the document "would be received as evidence of the criminality of a fugitive criminal from the United States charged before a tribunal in Great

Britain with an extradition crime under the extradition treaty as existing between that country and the United States."

The document must appear to be one which would be received as evidence of the criminality of Fowler, in respect to this offence, by the tribunals of Great Britain, if the inquiry were going on there in respect to the offence as committed there, and not a document which would be received by the tribunals of Great Britain as evidence of the criminality of a fugitive criminal from the United States charged before one of such tribunals with an extradition crime committed in the United States.

The original depositions of Jowett and Hustler purport to have been severally taken and sworn to at Bradford before W. Pollard, a justice of the peace. Under the foregoing views, the certificates to such depositions ought to be in, or amount in substance to, the following forms:

"I hereby certify that the signature of W. Pollard to the foregoing deposition is, to the best of my knowledge and belief, his signature, and the signature of a magistrate in England having authority to take the same, and that said deposition certified as within, by said Pollard, to the taking thereof before him, and authenticated by a minister of state, and sealed with his official seal, would be received in the tribunals of Great Britain as evidence of the criminality of George Fowler, *alias* R. Gray, named in said deposition, in respect of the offence charged against him as committed in Great Britain, namely, that he feloniously did forge, utter, and put off certain orders, purporting to be orders by William Jowett, for the payment of money, to-wit, bankers' checks, for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain.

GODFREY LUSHINGTON,

"Assistant under Secretary of State for the Home
[Seal.] Department.

"Whitehall, 2d October, 1880."

"I certify that I believe the above signature, 'Godfrey Lushington,' to be the handwriting of Godfrey Lushington, Esq., D. C. L., assistant under secretary of state for the home department.

"JULIAN PAUNCEFOTE,

[Seal.] "Assistant Secretary of State for Foreign Affairs.

"Foreign Office, 7th October, 1880."

"I certify that I believe the above signature, 'Julian Pauncefote,' to be the handwriting of Sir Julian Pauncefote, one of the assistant under secretaries of state for foreign affairs; and that the foregoing documents are properly and legally authenticated, so as to entitle them to be received in the tribunals of Great Britain as evidence of the criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offence named therein, charged against him as committed in Great Britain, if the inquiry as to such criminality were being had in the tribunals of Great Britain. In witness whereof, I have subscribed my name and caused the seal of this legation to be affixed, this eighth day of October, 1880.

"J. R. LOWELL,

"Envoy Extraordinary and Minister Plenipotentiary

[Seal.] of the United States of America.

"Legation of the United States, London, October 8, 1880."

In regard to the copy of the information, in addition to the certificate of Angus Holden, justice of the peace, that it is a true copy of the original information, the certificates to such copy ought to be in, or amount in substance to, the following forms: "I hereby certify that the signature of Angus Holden to the foregoing copy information is, to the best of my knowledge and belief, his signature, and the signature of a magistrate in England having authority to take such information, and that the original of said information would be received in the tribunals of Great Britain as evidence of the criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offence charged against him as committed in Great Britain, namely, that he feloniously did forge, utter, and put

off certain orders, purporting to be orders by William Jowett, for the payment of money, to-wit, bankers' checks for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain, and that said copy information is authenticated according to the laws of Great Britain.

"GODFREY LUSHINGTON,

"Assistant Under Secretary of State for the Home
[Seal.] Department.

Whitehall, 2d October, 1880."

"I certify that I believe the above signature, 'Godfrey Lushington,' to be the handwriting of Godfrey Lushington, Esq., assistant under secretary of state for the home department.

T. V. LISTER,

[Seal.] "Assistant Under Secretary of State.

"Foreign Office, 2d October, 1880."

"I certify that I believe the above signature, 'T. V. Lister,' to be the handwriting of T. V. Lister, Esq., one of the assistant under secretaries of state for foreign affairs, and that the original of the foregoing copy information would be received in the tribunals of Great Britain as evidence of the criminality of George Fowler, *alias* R. Gray, named therein, in respect of the offence charged against him, as committed in Great Britain, namely, that he feloniously did forge, utter, and put off certain orders, purporting to be orders by William Jowett, for the payment of money, to-wit, bankers' checks for the payment of the sum of £60, with intent thereby then and there to defraud, if the inquiry as to such criminality were being had in the tribunals of Great Britain, and that the foregoing documents are authenticated according to the law of Great Britain. In witness whereof, I have subscribed my name, and caused the seal of this legation to be affixed thereto, this seventh day of October, 1880.

"J. R. LOWELL,

"Envoy Extraordinary and Minister Plenipotentiary
[Seal.] of the United States of America.

"Legation of the United States, London, October 7, 1880."

The certificate to the copy warrant should be in like form, *mutatis mutandis*.

It follows, from the foregoing considerations, that neither the depositions nor the copies of the information or of the warrant were admissible in evidence by virtue of the certificates accompanying them. In regard to the copy information, Mr. Dobson, a detective officer attached to the Bradford police, who came to the United States to take Fowler back to England, testifies that such copy is a copy of the original information; that he saw the original and was present when it was made, and saw Jowett sign it in the presence of Holden; that Holden is a justice of the peace at Bradford, and acting as such; and that the signature to the copy is the signature of Holden. Mr. Dobson also testifies that the copy warrant is a copy of the original warrant; that he was present when the original was signed, and that it was issued by a justice of the peace at Bradford, and that he has the original in his possession. But there is no evidence that the authentication of the copies is according to the law of Great Britain. The relator objected before the commissioner to the admission in evidence of the copies, but they were admitted on the evidence of Mr. Dobson. They were not competent evidence.

A different case exists as to the depositions of Jowett and Hustler. The originals were offered. Mr. Dobson testifies that W. Pollard, before whom they were sworn and taken, is a justice of the peace for Bradford; that he, Dobson, was present when the depositions were taken; that they are the originals; that they were sworn to by Jowett and Hustler severally; that two checks were produced to Jowett at the time, to which he referred in his deposition, as originals, (the witness producing copies of them, compared by himself, which are part of the case;) and that the indorsements were on the checks when they were presented to Jowett in court. Mr. Dobson also testifies that he has been attached for 12 years to the police force of Bradford; that he is familiar with the ordinary course of criminal procedure in England for the apprehension of offenders; that the said depositions would be used and received in evidence before the magistrates at Brad-

ford, the same as they are sought to be introduced here, after the arrest; that the magistrate in England takes a written deposition of the complainant and witnesses in the presence of the accused, without counsel for the accused, the accused being allowed to question the witnesses if he feels disposed, if he has no counsel; that such depositions are taken in writing, and admitted and made part of the procedure; that he, Dobson, has often conducted criminal prosecutions himself, acting in place of the chief constable, who is the chief prosecutor; that he considers himself perfectly familiar with the course of criminal procedure in England; and that these proceedings are according to the practice there, and these depositions would be received in England. On this evidence the original depositions were properly admissible in evidence.

Upon the contents of said depositions, and on the oral testimony given here before the commissioner, there was legal and competent evidence of facts before him for him to consider in making up his decision as to the criminality of the accused. On all the points bearing on the criminality of the relator, testimony legally admissible contains materials for a decision by the commissioner on the question of fact as to whether there was before him such evidence of criminality as the treaty requires. The commissioner having decided such question of fact, his decision cannot be reviewed by this court on *habeas corpus*. *In re Stupp*, 12 Blatchf. C. C. R. 501; *In re Vandervelpen*, 14 Blatchf. C. C. R. 137; *In re Wiegand*, Id. 370; *In re Wahl*, 15 Blatchf. C. C. R. 334. The writs must be discharged and the relator be remanded to the custody of the marshal.

LINDER, Assignee, etc., v. LEWIS and others.

(District Court, S. D. New York. August 15, 1879.

1. **EQUITY PRACTICE—FINAL HEARING—INTERLOCUTORY ORDERS—REVISION.**—At the final hearing of a cause all the previous interlocutory orders in relation to the merits are open for revision and under the control of the court.
Tourniquet v. Perkins, 16 How. 82.
2. **ASSIGNEE IN BANKRUPTCY—SUIT TO SET ASIDE ASSIGNMENT—EXECUTION CREDITORS.**—If an assignee in bankruptcy intends to bring suit against intervening execution creditors who have received part of the proceeds of an assigned estate, he must make them parties defendant to the suit brought against the assignee to set aside the assignment.
3. **SAME—EXECUTION CREDITORS—ACTION AT LAW.**—In such case the assignee in bankruptcy is not compelled to bring a separate action at law to recover such proceeds of the assigned estate.
4. **SAME—VALIDITY OF ASSIGNMENT.**—In such suit the question of the validity of the assignment can be raised and determined.
5. **SAME—EXECUTION CREDITORS—DEMAND.**—Demand and refusal need not be averred or proved, in order to recover in such suit.
6. **ASSIGNMENT—VALIDITY—FILING SCHEDULES AND BOND—LAWS OF NEW YORK.**—The filing of schedules and bond are not essential to the validity of such assignment under the laws of New York.
7. **SUIT TO SET ASIDE ASSIGNMENT—EXECUTION CREDITORS—INTEREST.** In such suit interest should not be allowed against the execution creditors from the time of the levy, but only from the time suit was commenced against them.

G. H. Yeaman, for complainant.

M. H. Regensberger and *R. D. Benedict*, for defendants.

CHOATE, D. J. Upon the hearing of exceptions to the master's report and motion for a final decree the respondents, the sheriff, and the judgment creditors upon whose executions the property included in the voluntary assignment from the bankrupt to the respondent Lewis was seized, object to the entering of any decree against them, and claim that in the former decision of the court, in accordance with which an interlocutory decree was entered against them for an account of that part of the assigned property which came into their hands, there was error; that no case for equitable relief is

made against them. It is suggested on the part of the complainant that the proper way to raise this question is upon an application for a rehearing. The respondents have the right, on the application for a final decree, to raise the question. At the final hearing of the cause all the previous interlocutory orders in relation to the merits are open for revision and under the control of the court.

If, therefore, there has been, as is suggested, an obvious error of law in the former decision, this is a proper stage of the case for its correction, (*Tourniquet v. Perkins*, 16 How. 82;) and as the points now urged in favor of these respondents were not presented to the court upon the former hearing, I have carefully considered them, treating them as undetermined in the decision herein before rendered. The facts have been already stated. The sheriff levied on the property included in the voluntary assignment, and the goods were sold, and the proceeds paid over to the judgment creditors in satisfaction of their executions after the execution and delivery of the voluntary assignment, and before the filing of the original petition in bankruptcy. The suit is brought against the voluntary assignee, the sheriff, and the judgment creditors—*First*, to avoid the assignment as in contravention of the bankrupt law; and, *secondly*, to recover of the respondents the property, or the proceeds of such parts of it as they have disposed of. It has been determined in the case that the assignment was void, as against the assignee in bankruptcy, on the ground alleged in the bill, that it was made in contemplation of insolvency, with intent to defeat the operation of the bankrupt law, and it has been set aside. And it has been held that under the authority of the case of *In re Biesenthal*, 15 N. B. R. 228, the title of the assignee in bankruptcy related back to the time of the execution of the voluntary assignment, and the execution creditors took nothing by their levy.

It is now suggested that, upon this theory of the case, the only remedy of the assignee in bankruptcy is by an action at law in the nature of an action of trespass for interfering with his property, or of an action of trover for its conversion;

that such remedy is full, adequate, and complete, and that, therefore, the assignee in bankruptcy has no remedy in equity as against these respondents; that there was no ground for making them parties to a bill for setting aside the assignment; that they do not claim under the state assignee, but in hostility to him. It is further objected that no decree should be made against them, because they claim that the assignment was void under the laws of New York, and, therefore, whether it was voidable under the bankrupt law or not, there was left in the bankrupt a title which, under the laws of New York, could be reached by the levy of execution. And the particular grounds on which it is claimed that it was thus void are that at the time of the levy of the executions no schedules had been filed, and no bond given by the assignee; that this last question of the validity of the assignment under the laws of New York is one which cannot be tried in this suit, but must be tried in a suit between the state assignee and the sheriff, which suit had been commenced before this suit was commenced.

It is further insisted that this case is distinguishable from the case of *In re Biesenthal* in this respect: that in that case the property in question on which a levy had been made, part of the assigned property, had not been sold by the sheriff, but was afterwards sold, by consent of the parties in the suit, to set aside the assignment, and the proceeds deposited in the registry of the court to abide the decision of the court in that suit as to the rights of the parties; so that there was a fund in court in respect to which the court had jurisdiction to determine all rights, or that the execution creditors were parties claiming a lien and interest adverse to the complainant in respect to the very property in controversy between the assignee in bankruptcy and the state assignee in the suit brought to set aside the assignment. Whereas, in the present case, the question between the assignee in bankruptcy and the execution creditors relates, not to any specific property, part of the assigned estate, or to any proceeds of it traced and identified as such, but his claim against them is merely for money damages.

It is true that there is this distinction in the facts between this case and the case of *In re Biesenthal*: that here no part of the assigned property or of its proceeds, traced and identified as such, in the form of a particular sum of money, is shown to be in the possession of the execution creditors, but the property has been sold by the sheriff upon their procurement, and the money has, before the institution of bankruptcy proceedings, been paid to them and applied in part satisfaction of their judgments, whereby its identity, as part of the assigned estate, has been wholly lost. It is true, also, that, in levying their executions on this property as the property of the bankrupt, they have not claimed under but in hostility to the assignment. But it does not follow from these differences in the facts that the case of *In re Biesenthal* does not apply, nor that the complainant has not properly made them parties defendant to this suit, or that he has any remedy at law to recover from them the proceeds of the assigned property received by them. A voluntary assignment, made within the time before bankruptcy limited by the bankrupt law, and in violation of its provisions, is not, on that account, absolutely void. It is voidable only at the option of the assignee in bankruptcy; and the proper and only way in which he can exercise that option is by a suit in equity to set it aside. It may be for the interest of creditors, and it may be his duty, not to exercise that option; but, by neglecting to bring a suit for that purpose, to affirm it so far as he is concerned. If, therefore, this complainant had brought no suit to set aside the assignment, the defendant's levies of execution could not be impeached by him, and their title as against him would be perfect. He could not, therefore, without suit to set aside the assignment, maintain trespass or trover against them.

The answer would be complete that the assignment was voidable only, not void; that it had never been avoided; that for that purpose the state assignee must be made a party defendant; that, if avoided, it must be avoided in whole and not in part; that the assignee could not, as to that particular part of the property levied on, elect to avoid the assignment, leaving it in full force as to all the rest of the assigned

property. Nor would these respondents in such a suit be estopped to deny that the assignment was void under the bankrupt law. They might be estopped to deny that it was void under the laws of New York, because by levying on the property as the property of the debtor they affirm the invalidity of the assignment; but that invalidity is not the same sought to be established under the bankrupt law. Nor, as it seems to me, could the assignee in bankruptcy, having brought suit against the state assignee without joining these defendants and obtained a decree avoiding the assignment, then maintain an action at law against these execution creditors to recover the money paid to them out of the proceeds of the assigned property, and put in evidence his decree against the state assignee in proof of the invalidity of the assignment under the bankrupt law. They might well answer that that decree was not binding on them in respect to the part of the property received by them; that the case of the complainant against them depending upon the question whether the assignment was in fact made under the circumstances and with the intent denounced by the bankrupt law as making it voidable, that on that issue they had a right to a trial before they could be concluded by the decree.

It seems clear, therefore, that if the assignee in bankruptcy intends to bring suit against intervening execution creditors who have received part of the proceeds of the assigned estate, he must, at any rate, make them parties defendant to the suit brought against the state assignee to set aside the assignment. Is there any principle of law or equity which will compel him to bring two suits against them, first joining them as defendants in the suit to set aside the assignment, so that the determination in that question may be binding upon them, and afterwards suing them in an action at law upon the basis of that determination to recover the money? I think not. On the contrary, the general rule is that where a court of equity acquires jurisdiction for one purpose, it has the power to go on and administer complete relief.

General demurrers to the bill, for want of equity, were filed by the execution creditors, which demurrers were overruled.

I have not treated the overruling of these demurrers as conclusive on this point, because the bill alleges that these levies of execution were fraudulent and collusive, and therefore preferences under the bankrupt law; and as the ground of the demurrers was general want of equity, and not the improper joinder of causes of action or multifariousness, and no reasons were assigned by the learned judge who overruled the demurrers, his decision may possibly have been made on the averments that these levies were unlawful preferences. No proof, however, has been given to sustain these averments. There seems to be no force in the suggestion that the question whether the assignment was absolutely void by the law of New York could not be raised and tried in this suit. In fact, that defence is set up in the answer, and put in issue by the replications. It has been tried and determined adversely to the defendants. If it had been determined in their favor, it seems that they would have been entitled to a decree dismissing the bill as to them. *In re Biesenthal*, 18 N. B. R. 120.

It is further objected that the complainant is not entitled to a decree against these defendants because it is neither averred nor proved that the complainant, before suit brought, made a demand for the money now sought to be recovered, and that the defendants refused to pay it. The objection comes rather late and has no especial merit, but possibly it is open at this stage of the case. The cases, however, cited to the effect that, where a party has come lawfully to the possession of property, replevin or trover will not lie till after a demand and refusal, do not apply to a case where, before suit brought, the defendant has actually disposed of the goods, and put it out of his power to restore them.

It is also suggested that the assignment was absolutely void, because, at the time of the levy, schedules and a bond had not been filed, as required by the laws of New York. This point seems not to have been made upon the former hearing, nor is any authority cited in support of it now. The argument against the assignment before was that it was not intended for the benefit of creditors, but was fraudulent, in

fact, between the assignors and the assignee, to hinder, delay, and defraud creditors. (See brief of complainant's counsel.) Such failure to file schedules and bond is not expressly made a condition to the assignments taking effect as a conveyance, and I do not think they are essential to the passing of the title.

I see no ground, therefore, for disturbing the former decision against these defendants, that they were liable to account for that part of the assigned property which came to their hands, and which has been shown to belong to the complainant. An exception is taken to the master's report that he should not have allowed interest. I see no reason why the defendants should not be charged with interest.

Exceptions overruled. Report confirmed, and decree for complainant therein, with costs.

DECISION ON APPEAL.

(Circuit Court, S. D. New York. June 1, 1880.)

BLATCHFORD, C. J. All the points urged by the appellants appear to have been carefully considered by the district judge in his decision. So far as the main questions at issue are concerned, I think they were all properly disposed of except the question of interest. Keifer & Co., Leisler & Co., and the sheriff, who have appealed, and who are the only appellants, excepted to the allowance of interest, by the referee, from July 9, 1875, the date of the levy by the sheriff, on the ground that no interest should be charged against such excepting parties. I think interest should be allowed against such excepting parties only from the time the suit was commenced in the court below, but that interest should be allowed from that date as against them.

The decree should be modified in that respect, but the appellants should pay the costs of the appeal.

KIMBALL v. THE COUNTY OF STANTON.

(Circuit Court, D. Nebraska. November 10, 1880.)

1. PLEADING—GENERAL ISSUE—DENIAL.

———, for plaintiff.

———, for defendant.

MCCRARY, C. J. This is a motion to make a part of the answer more specific. The general allegation of the answer is that defendant denies each and every material allegation of the petition. The motion requires him to specify what is denied and what is admitted. As a matter of course, the pleader is not to be the judge as to what is material and what is not. A denial of the material allegations is not a sufficient denial of the general issue.

BUZZELL and others v. O'CONNELL.

(Circuit Court, D. Massachusetts. October 15, 1880.)

1. PATENT No. 100,229, issued to Herbert L. Willis, for an improved sand-paper holder for finishing or "buffing" the soles of boots and shoes, *sustained*.

In Equity.

George S. Boutwell and Chas. Allen Taber, for complainants.
Chauncey Smith and Samuel W. Bates, for defendant.

LOWELL, C. J. Herbert L. Willis obtained patent No. 100,-229, now the property of the complainants, for an improved sand-paper holder for finishing or "buffing" the soles of boots and shoes. He described a cylinder formed of two halves hinged together; round each half the sand-paper was wrapped, and its edges were brought together on the inside of the cylinder and kept tight by pins and dowels; journals were shown to which each end of the cylinder was attached by screws. The old form of holder was described as solid, with the sand-paper

wrapped around it and secured by tacks. "This mode," says Willis, "is very imperfect, there being several objections to it: *First*, the lapping of the edges of the paper makes the surface irregular, causing unequal wear, and not smoothing the soles perfectly, besides rendering the paper liable to be torn off; *second*, the frequent driving of the fastening tacks into the roller soon cuts up and destroys the surface thereof, especially if the wood is soft, or, if the wood is hard, the tacks are often broken and it is difficult to draw them out; *third*, the labor and time required to make the frequent reversals of the paper are considerable; *fourth*, the unevenness of the lapped paper causes jarring and unsteadiness in operation."

The defects are said to be removed by the new mode of construction: "The edges of the sand-paper do not lap on the surface of the cylinder, thus leaving the surface perfectly regular and concentric as the holder revolves. The paper also is held more securely, and wears evenly, doing good work, and the sheets are quickly taken off and replaced." He described another short cylinder, of large diameter, which was to be added to the holder for the purpose of finishing the instep under the heel.

The first claim is: "A sand-paper holder, for finishing the soles of boots and shoes, composed of two parts, A, B, hinged together at one edge, and fastened together by screws, or the equivalent thereof, with or without the enlarged holder, composed of hinged parts, C, D, similarly arranged, substantially as described."

The second claim was for the dowels and pins, and has been disclaimed.

The evidence tends to show that a buffer made according to the patent is useful; and that buffing cylinders are now very extensively used to the advancement of the trade.

The defendant uses a holder or buffer, which, whether an infringement or not, is an undoubted improvement over that described in the patent. It consists of a cylinder cut lengthwise and hinged in the middle, and covered with sand-paper. Instead of being secured to journals by ordinary screws running through the cylinder into the journal, it is fastened by a

movable clamp of ingenious construction, patented by Fay after the date of Willis' invention. Both parties use felt under the sand-paper, which appears to have been introduced by Howe, whose patent is also later than Willis'. The defendant has a right to use these two patents.

The defendant insists that Willis made no invention which will support a patent. Solid cylinders, with sand-paper tacked to them, had been used before; and one Copeland had, as early as 1855, made and patented a hand-tool in which the sand-paper was wrapped round two halves of an ellipse, which were hinged by a piece of cloth glued to each, and was held firmly together by the hand of the operator, who rubbed the soles with this tool, much as he would have done with a large file or rasp having a handle at each end. The defendant contends that the only change which Willis introduced was to cut the old solid cylinder into two parts and hinge those parts together, just as Copeland had hinged his hand-tool; and that this did not require invention. How generally the old solid cylinder was used, and whether it was of much or little value, we are not informed. I infer from the remarks of one witness that the patentee's cylinder, or those like it in principle, first brought buffing by machinery into common use. Supposing the old solid cylinder used in a machine driven by power to have been of some use, and to have been generally known, still, I think, there was a patentable improvement in cutting it in two, bringing the parts together, and fastening them to the shaft, so that they should operate like a solid cylinder, though the hinged tool to be operated by hand had already been introduced by Copeland. The advantages of the knife, and this mode of adjustment and of operation, are so different in the two cases that one could hardly be an anticipation of the other. It seems to me that the defendant infringes the first claim of the patent. He has a better working tool; but it is made on the principle of the plaintiffs' patent. It is a cylinder cut in two, hinged, wrapped with sand-paper, and held together and upon the journals by a shaft. It may be that the particular mode of fastening is new in this tool. There is no evidence upon that point, except

that it is patented; but I do not find the plaintiffs' first claim to be so narrow that a new mode of fastening, operating to do the work of their screws, would escape it.

Decree for the complainants.

SIEBERT CYLINDER OIL CUP CO. v. HARPER STEAM LUBRICATOR CO.

(Circuit Court, D. Connecticut. October 25, 1880.)

1. RE-ISSUE—NEW MATTER. — A device was patented as for a lubricator acting by steam pressure. Subsequent investigation led to the conclusion that, although steam rendered slight assistance, hydrostatic pressure was the active agent. Thereupon a new arrangement of parts was made in which the latter principle only was used, and the second device was patented. *Held*, that the patentee could not subsequently obtain a re-issue of the first patent which would cover the method of feeding a lubricant by means of hydrostatic pressure alone, operating through devices substantially as shown.
2. SAME—SAME—DEFINITION.—By new matter is meant "new, substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent."

Powder Co. v. Powder Works, 98 U. S. 126, followed.

Yale Lock Manuf'g Co. v. Scovill Manuf'g Co., 3 FED. REP. 218, distinguished.

A. H. Evans, for plaintiff.

Henry T. Blake, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the alleged infringement of re-issued letters patent, which were issued on June 3, 1879, to Nicholas Siebert for a lubricator of steam-engines. The original patent was issued September 14, 1869.

The device, which is described and claimed in the re-issue, is clearly explained by General Ellis, the plaintiff's expert, as follows:

"This device is an improvement in lubricators. It consists of a horizontal cylinder, in which transverses a piston, to one side of which is attached a piston-rod, which passes through

the end of the cylinder, and serves as a gauge to indicate the position of the piston at the end of the cylinder. On the opposite side of the piston head is an opening, to which is connected a vertical pipe; between which vertical pipe and the cylinder is a three-way cock connecting with cylinder, vertical pipe, and discharge pipe. At the opposite end of the cylinder is a pipe, furnished with a cock, leading to a point at which the lubricating material is to be delivered. On the top of the cylinder is a feeding cup, likewise furnished with a cock for pouring in the lubricant; likewise, on top of the cylinder, is a small cock for allowing the air to discharge when the lubricant is poured in. The operation of this machine is as follows:

"The piston being pushed to the rear end of the cylinder, the lubricant is poured in to fill it upon the front side, or that which is furnished with the piston-rod. The pipes at the two ends of the cylinder are supposed to be submitted to an equal pressure from the steam. The vertical pipe at the rear end of the cylinder becomes filled with water from the condensed steam, the hydrostatic pressure from which, as it enters the cylinder, pushes the piston forward and expels the lubricant. On the rear side of the piston there is steam pressure added to the hydrostatic pressure of the water which condenses in the vertical pipe. On the front side of the piston there is the pressure only of the steam and the atmospheric pressure upon the small area of the piston-rod, which serves as a gauge. This makes an excess of pressure upon the rear, due to the hydrostatic column in the vertical pipe, which presses the piston forward and drives out the lubricant through the discharge pipe."

The claims of the re-issue are as follows:

"*First.* The arrangement of a cylinder, A, provided with a piston, B, and pipe, N, substantially as described, whereby the lubricant is fed by means of hydrostatic pressure or steam pressure, or both.

"*Second.* The cylinder, A, pipe, N, and cocks, G and H, arranged substantially as described, whereby the lubricant may be fed by hydrostatic pressure.

"*Third.* The method herein described of feeding a lubricant by means of hydrostatic pressure operating through devices substantially as herein shown and explained."

The second and third claims only are said to have been infringed.

The defendant's device has a vertical instead of a horizontal cylinder, has no piston, but the oil and water are separated by the difference of their specific gravities. I assume, what is denied by the defendants, that the principle of its device is solely that of hydrostatic pressure. It may also be assumed that Siebert first introduced this principle in an automatic oiler of steam-engines. The important question in the case seems to me to be the validity of the second and third claims of the re-issue, if those claims are to receive the construction which would naturally be given to the language which is used.

When Siebert applied for his original patent in 1869 he was manifestly ignorant that the principle of hydrostatic pressure was contained in his device. This is manifest from the entire specification, which attributes the action of the piston, in forcing the oil through the delivery cock, entirely to the pressure of the steam admitted through the cock at the base of the vertical pipe. For example, the patentee says: "A cock admits steam behind the piston, and forces it slowly forward, while another cock, at the opposite end of the cylinder, allows the tallow to pass to its destination. At the back of the cylinder is the cock, G, which admits the steam, by the pressure of which the piston is forced along." There is no mention in the claim of the vertical pipe, or of hydrostatic pressure. Indeed, the vertical pipe did not appear in the drawings, though it was shown in the model. Subsequent investigations having led Siebert to discover, in May, 1879, the value of hydrostatic pressure, "he caused to be made a new arrangement, by which the lubricant reservoir was made to stand vertically, instead of horizontally, as in his first invention, and hydrostatic pressure was applied near its base, at the bottom of the lubricant. For this arrangement he took out his patent of February, 1871. The princi-

ple was manifestly the same as that revealed in the earlier patent, though the arrangement for its operation was different." *Garratt v. Siebert*, 98 U. S. 75.

After the patent of 1871 had been granted, the patentee sought and obtained a re-issue of the patent of 1869. The re-issue described the invention as follows: "My invention consists in a novel method of feeding the oil to the cylinders, said feed being accomplished by means of hydrostatic pressure, operating through devices substantially as herein described. In the general mode of feeding oil to cylinders, the opening through which the oil passes to the valves or other parts is the only point where the lubricant is exposed to the effect of the steam pressure, and the oil is subjected to constant ebullition, and an irregularity of feed is a necessary result. If steam can be applied on each side of the body of the lubricant, so as to produce a state of equilibrium, and then some constant and regularly-augmented power be brought into operation to disturb this equilibrium in one direction, the oil will be forced in that direction, and be supplied with a regularity depending upon the regularity of the augmentation of the power used to disturb the equilibrium of the steam pressure on the lubricant. One of the powers I use to disturb the steam equilibrium is a hydrostatic column, formed by the condensation of steam in an extended pipe, to form one of the steam connections, to create the equilibrium before mentioned."

Again he says: "The steam, becoming condensed in the pipe, N, forms a hydrostatic column behind the piston, and this column, acting in conjunction with the steam in pipe N, overcomes the pressure from pipe M, and the piston is forced slowly and regularly in the direction of the arrow, thus giving a constant and regular feed of the lubricant through the supply pipe, M, and the continued condensation of the steam regularly augmenting and supplying the hydrostatic column."

The testimony shows that the active principle for expelling the lubricant from the cylinder is the hydrostatic column in the vertical pipe, and that steam aids hydrostatic pressure to this small extent: "Upon the rear side of the piston the

steam exerts a pressure upon the whole area; upon the front side of the piston the steam exerts a force upon the whole area, less the area of the piston-rod, upon which small area is only exerted the pressure of the atmosphere. Therefore, steam of greater than atmospheric pressure would assist in driving the piston forward, and expelling the lubricant by this small difference."

There is, however, some slight assistance by the force of steam. It will be observed that the specification acknowledges steam as one of the propelling forces.

This is the state of the facts: The patentee had invented a lubricator, the efficient agent in which was the pressure of steam, as he supposed. The device was patented as for a lubricator acting by steam pressure. Subsequent investigations led him to the conclusion that although steam rendered slight assistance, hydrostatic pressure was the active agent. He made a new arrangement of parts in which the latter principle only was used, and the second device was patented. The patentee now seeks, by a re-issue of the first patent, to obtain a patent from 1869 which shall cover the method of feeding a lubricant by means of hydrostatic pressure alone, operating through devices substantially as shown.

It is not contended that the patentee has not a right to introduce in his re-issue the vertical pipe which had been left out of the drawings, and to claim that arrangement of all the parts of his device which he actually invented, whereby the lubricant was fed by hydrostatic pressure or steam pressure, or both; in other words, the first claim of the re-issue. But it is insisted that an introduction into the claims of matter which discards steam pressure, with the piston, as an agent for feeding the oil, and thus changes the nature of the invention which was originally applied for, is an introduction of new matter. I am of opinion that the last two claims, if construed in any other way than by such limitations as shall confine them to the mechanism specified in the first claim, substantially as described, are, under the recent decisions of the supreme court, an undue enlargement of the original patent.

The additions come within the definition of new matter in *Powder Co. v. Powder Works*, 98 U. S. 126: "By 'new matter' we suppose to be meant new, substantive matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent." The point is not whether means for the application of the principle of hydrostatic pressure had not been invented by Siebert, and whether he had not mistaken the nature of his invention when he applied for a patent, but it is whether it is proper for him to introduce into the claims of the re-issue a somewhat different invention from that which he had made when the original patent was granted; for it cannot be forgotten that the invention which he actually made was a lubricator by hydrostatic and steam pressure, though it is true that hydrostatic pressure was the active principle and was "revealed" in the invention.

"The legislature was willing to concede to the patentee the right to amend his specification, so as fully to describe and claim the very invention attempted to be secured by the original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived. For such inventions he is required to make a new application, subject to such rights as the public and other inventors may have acquired in the meantime." *Powder Co. v. Powder Works*, cited *supra*.

The case is a different one from that of the *Yale Lock Manuf'g Co. v. Scovill Manuf'g Co.*, recently before this court. In that case the invention described in the re-issue was manifestly the same which formed the subject of the original specification, but was there cramped within too narrow bounds. In this case, the invention which is described in the last two claims of the re-issue is not the same which was the subject of the original specification, and those claims are therefore void.

The bill should be dismissed.

BIGNALL v. HARVEY and another.

(Circuit Court, N. D. New York. October 25, 1880.)

1. RE-ISSUED LETTERS PATENT granted to John Deuchfield, January 16, 1872, for 14 years from April 20, 1858, "for an improvement in cooling and drying meal," *held*, not void for want of novelty.
2. SAME—IDENTITY OF PATENTEE.—A re-issue to John Deuchfield is not void because the original patent was issued to John Deuchfield, where the change in the letter was a mere clerical and accidental mistake of the patent-office, and no question had been raised at the taking of the proofs as to the identity of the patentee, and where there was in fact sufficient evidence given to show that the original and re-issue were issued to the same person.

Benjamin F. Thurston and Edward S. Jenney, for plaintiff.
George Harding and George B. Selden, for defendants.

BLATCHFORD, C. J. This suit is brought on re-issued letters patent granted to John Deuchfield, January 16, 1872, for 14 years from April 20, 1858, "for an improvement in cooling and drying meal." It is the same patent which was the subject of the suit in *Herring v. Nelson*, 14 Blatchf. 293. In that case, after full consideration, the re-issued patent was sustained against the objections that it was not for the same invention as the original patent; that new matter had been introduced into the specification of the re-issue contrary to the statute; and that the patentee was not the first inventor of what is claimed in the first claim of the re-issued patent.

The defendants in the present case do not ask for a review or reconsideration of any of the specific questions disposed of in the former case. But two new matters are brought up on the question of novelty. One is a patent granted in England, December 8, 1853, to Joseph Robinson. The other is an addition granted July 31, 1840, to a French patent granted April 21, 1837, to one Cartier.

The Robinson patent cannot be held to be an anticipation. It is clear, from the drawings of the plaintiff's patent, that the curbs of the mill are open curbs, as distinguished from close curbs; that is, are the open curbs which were in general use in the American mills at the time. Open curbs are curbs or

covers over the upper millstone, provided with a circular opening over the eye of the upper stone. This enables the air in the plaintiff's arrangement to pass over the top of the upper stone, and through the annular space between the outer edges of the stones and the inside of the curb, and thence, with the meal, through the closed meal spouts, into and through the closed meal chest.

In the Robinson patent the small orifice in the center of the top of the curb is tightly stopped up by a tube which extends downward into the eye of the upper stone, the outside of the tube filling the interior of the eye. The object must have been, as the necessary operation was, to prevent the passage of air over the top of the upper stone, inside of the curb, and to force it to go down into the eye and between the grinding faces of the stones. Thus, the operation is the reverse of that in the plaintiff's patent. Moreover, Robinson has no current of air traversing the length of the meal chest and carrying off the moisture which arises from the meal as the screw conveyor operates upon it. The elements combined in Robinson's are not combined in the same way as in the plaintiff's patent, to produce the same result by the same mode of operation.

As to the Cartier arrangement, which is the one most earnestly pressed, I have examined with care all the evidence in regard to it. It would be unprofitable to discuss such evidence minutely. It is sufficient to say that the description and drawings of Cartier do not furnish such clear and definite information as to enable a skilled person, beyond any reasonable doubt, by following them, without aid from anything not known when they were made, to construct an apparatus like the plaintiff's. They do not meet the requirement of law in regard to what is necessary, in a prior description and drawings, to defeat a subsequent patent. They are neither full nor clear nor exact.

The only other point urged in defence is that the original patent was granted to John Deuchfield, and that the re-issue is to John Deuchfield, and is therefore void. The re-issued patent states that the original was issued to "him," that is,

John Deuchfield; that it had been surrendered and cancelled, and that a new patent has been ordered to issue to "him." The plaintiff has put in evidence a certificate of extension which states that on the petition of John Deuchfield for the extension of the patent granted to him April 20, 1858, and re-issued January 16, 1872, it is extended for seven years from April 20, 1872. An original patent is in evidence which was granted to John Denchfield, April 20, 1858, for 14 years from that day; and there is no dispute that that is the patent which was surrendered when the re-issued patent to John Deuchfield was granted, and that no original patent was granted to John Deuchfield unless the one so granted to John Denchfield was one. The real name of the man was Denchfield. The mistake was clearly one made in the patent office—a clerical and accidental mistake in taking the letter *n* to be the letter *u*.

The defendants did not, at any stage of the taking of the proofs in the cause, raise any question as to the identity of the person to whom the re-issue was granted with the original patentee, either when the documentary proofs were being put in or when the oral testimony was being taken. In the defendants proofs the questions to their witnesses, and the answers thereto, refer to the re-issue as having been granted to John Denchfield, and as having been granted to the same person to whom the patent of April 20, 1858, was granted. If the point had then been suggested doubtless the plaintiff would have proved, in fact, the identity of John Deuchfield with John Denchfield. Such identity seems to have been shown in *Herring v. Nelson*, the evidence in which case is made part of this case by stipulation and notice. The question is one of identity merely. *Panes v. Whitbread*, 11 C. B. 406; *Jackson v. Boneham*, 15 John. 226; *Jackson v. Cody*, 9 Cow. 140. The defendants gave no evidence to show that there was any such person as John Deuchfield, or that the re-issue was not intended to be issued, or was not, in fact, issued, to the same person to whom the original patent was granted. Indeed, there is sufficient in the proofs, in the evidence given by the plaintiff as a witness, to show that the

person to whom the original patent was granted, and whose name was John Denchfield, was the person to whom the re-issue was granted. Such proof is always competent in a case like this. *Jackson v. Stanley*, 10 John. 133. See *North-western Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.* 6 O. G. of Pat. Office, 34. Infringment of the first claim of the re-issue is proved, and not contested. As the patent has expired there can be no injunction, but the plaintiff is entitled to the usual decree, in other respects, in regard to said first claim.

ORHANOVICH, Master of the Bark Rebecca, v. THE STEAM-TUG AMERICA.*

(Circuit Court, E. D. Pennsylvania. October 28, 1880.)

1. ADMIRALTY—COLLISION—TOWING—ORDER IN WHICH VESSELS SHOULD BE TOWED.—A tug held responsible for damages by a collision between two vessels in tow while passing through a narrow, shallow channel, where it appeared that one of the vessels was known to be a bad steering vessel, and had been placed by the master of the tug behind the other vessel.
2. SAME—CONTRIBUTORY NEGLIGENCE—ORDER GIVEN AT MOMENT OF IMMINENT PERIL.—The injured vessel held not to be liable for an order given at a moment of imminent peril, caused by the bad steering of the other vessel.
3. SAME—DAMAGE—BILLS FOR REPAIRS—WHEN PRIMA FACIE EVIDENCE.—Upon the question of the amount of repairs necessitated by a collision, the testimony of the master as to the aggregate cost of the repairs, and the testimony of the vessel's agent as to the payment of the bills, together with the production of the bills receipted, constitute *prima facie* evidence of the amount of damage, without calling the men who did the work.
4. SAME—LOSS BY DETENTION—RATE OF DEMURRAGE—WHEN PRIMA FACIE EVIDENCE.—Upon the question of damages by detention while undergoing repairs, the rate of demurrage fixed by the vessel's charter-party, accompanied by evidence that it is the rate adopted by the maritime exchange of the port, is *prima facie* evidence of the amount of loss.

Appeal from the decree of the district court, in admiralty.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.
v.4,no.4—22

Libel by the master of the bark Rebecca against the steam-tug America, for damages caused by collision with another bark while both vessels were being towed to sea by the tug. The facts in regard to the collision are fully set forth in the opinion of the court. The district court decided in favor of libellant, (see report of case, 36 Legal Intel. 279,) and referred the case to a commissioner (Wayne MacVeagh, Esq.,) to ascertain the amount of the damage. Before the commissioner the master testified as to the aggregate cost of the repairs. The agent of the owners then testified that he paid the various bills for repairs, making up that aggregate, which bills, approved by the master and properly receipted, he produced. He admitted, however, that he had no personal knowledge that the repairs had been made. The persons who did the work were not called. The respondent declined to take any testimony on this subject until the libellant had offered better evidence, and asked the commissioner to report that the evidence offered was insufficient. The commissioner reported that the evidence was *prima facie* sufficient, (citing Coote on Adm. Pr. 96,) and allowed the amount claimed.

With regard to the damages caused by the vessel's detention, it appeared that the rate of demurrage fixed by her charter-party was £15. It was proved that this was the rate adopted in charter-parties used by the maritime exchange of Philadelphia. The commissioner (citing Coote on Adm. Pr. 87) held that this was *prima facie* evidence of the loss, and, there being no evidence to show that it was unreasonable, adopted it as the measure of damages. The district court confirmed the report of the commissioner, and entered a decree for libellant in accordance therewith. See report of case in 8 Weekly Notes, 328. Respondent took this appeal.

J. Warren Coulston, for appellant.

Henry G. Ward and *Henry Flanders*, for appellee.

McKENNAN, C. J. The master of the steam-tug America contracted with the master of the bark Rebecca to tow her to Bombay Hook, or to sea, from the port of Philadelphia, with the understanding that an additional smaller vessel might be taken in the tow.

On the first of December, 1877, the America took the Rebecca in tow and proceeded down the Schuylkill, and at the mouth of that river took also in tow the bark Dudman, which was of two feet less draught than the Rebecca, but of wider beam. The tow was made up by placing the Rebecca next to the tug, and the Dudman in the rear of the Rebecca, to which she was attached by a hawser. This arrangement of the tow was made against the objection of the master of the Rebecca, who desired his vessel to be placed in the rear. The Dudman was known to the master of the tug to be a bad-steering vessel, and in going down the Delaware river she steered wildly, sheering from side to side. When the vessels approached the channel buoy, at the bight of Newcastle, where the Delaware river is narrowest, the pilot of the Rebecca put her helm hard a-port, in order to bring her in line with the government range lights, and pass in mid-channel, just to the eastward of the buoy, the tug pursuing her course unchanged, keeping on the port bow of the Rebecca, eastward of the channel. Just at this time the Dudman, having taken a sheer to the westward, drew the Rebecca out of her proper course, throwing her head to the eastward, so that, with the helm hard a-port, she kept going to port, instead of starboard, until she grounded on Goose island bar. When the Rebecca went aground the Dudman's sheer to the westward was broken, and she pulled around to the eastward again. At this time the pilot of the Rebecca hailed the Dudman to put her helm hard a-starboard, and immediately thereafter she struck the Rebecca in the port center, causing the injury complained of.

It is obvious that the collision was the result of two causes—*First*, the very bad steering qualities of the Dudman; and, *second*, the arrangement of the tow with the Dudman in the rear. If, by her ready obedience to her helm, she had been under the control of her pilot, or she had been placed ahead instead of behind the Rebecca, the collision would not have occurred. The master of the tug well knew that the Dudman steered badly, and this was made manifest in the passage down the Delaware, and he ordered the relative positions of the vessels in the tow. Was the collision, then, avoidable by

the exercise of reasonable skill and care on the part of the master of the tug? This question is clearly and concisely answered by the district judge in his opinion, which I adopt:

"Was there carelessness in taking the *Dudman* along? If, as alleged, her steering qualities were so bad as to render her virtually unmanageable in the river, and the respondent was aware of this, there was. That she was a bad steerer—indeed, very bad—is abundantly shown. The witnesses agree respecting it. The master of the tug says she 'steered badly; sheered all over the river going down, first on one quarter and then on the other of the *Rebecca*;' and the mate of the tug says she 'steered wildly going down the river.' Captain Wilkins, called by the respondent, says she steered so badly that it required two boats to take her down the Schuylkill; and when the respondent met and took her in tow on this occasion she was being thus conducted by the joint efforts of two tugs. That the respondent was aware of her peculiarity in this respect is equally clear. He had towed her before, and knew she steered badly; he so testifies. It does not appear that he ever towed her in company with another vessel before this occasion, or attempted to do so; and, if he had been without such previous knowledge, what he observed in passing down the river should have warned him of the danger of taking such a tow through the narrow, shallow channel near Newcastle.

"And while a proper regard for the libellant's safety forbade taking the *Dudman* along, in my judgment it especially forbade taking her *astern of the libellant's vessel*. Without considering the order in which two vessels of unequal draft, with proper steering capacity, should be placed in a tow, (about which decided opinions were expressed by the court in *The Morton*, 1 Brown, Adm. 139; *The Zouave*, Id. 110; and *The Sweepstakes*, Id. 509; though practical seamen, as the evidence here shows, seem to disagree respecting it,) I feel no hesitation in saying that to place this unmanageable craft behind, in passing through a narrow, shallow channel, was calculated to produce disaster. The width in the bight, at places, does not exceed 70 yards, and the depth, with the tide as it was

at the time of the accident, is 22 feet. The draught of the Rebecca is $20\frac{1}{2}$ feet. As obedient to her wheel as she is shown to be, she would respond very tardily when within a foot and a half of the bottom, and find some difficulty in controlling her course. With the Dudman wildly tugging at her stern she would be helpless, very likely to ground, and be run into by her unwieldy companion. And this is precisely what occurred."

This is enough to show that the master of the tug did not exercise that degree of good judgment and forethought which a careful discharge of his duty, under the circumstances, demanded, and that to his dereliction in this regard the loss complained of is ascribable.

Nor am I able to affirm the contention of the respondent that the Rebecca responsibly contributed to the collision by the order or request communicated by her pilot to the Dudman, just before the vessels came in contact, to put the helm of the latter hard a-starboard. Under all the circumstances, the effect of such a maneuver was, at least, problematical,—the opinion of the witnesses as to this decidedly differs,—but it is sufficient to say that, even if it was a mistake, no fault can be imputed to the Rebecca, because it was given at a moment of imminent peril, caused by the misconduct of the Dudman.

There ought, then, to be a decree in favor of the libellant; but for what sum? The commissioner, to whom the ascertainment of the damages was referred by the district court, reported the sum expended for repairs to the Rebecca, and the damages resulting from the loss of her use, upon the basis of the demurrage stipulated for in her charter-party, and for these sums, with other proper allowances, the decree of the district court was made.

But it is contended that these claims were allowed upon insufficient or improper evidence. Payments were made to persons who rendered bills for repairs made upon the Rebecca, which were certified by the master, who superintended the work, by the agent of the libellant. This was primary proof of the expenditure, of its purpose and its necessity, and,

unless answered by counter proof, was altogether sufficient to justify the allowance of such payments.

So, also, as to the damages for detention of the vessel. Demurrage, as such, is not claimable; but why may not a rate of demurrage, fixed by the vessel's charter and established by the rules of the maritime exchange, and which, therefore, would have been conceded to her if delayed by her charterer, be taken as a measure of fair compensation for a similar loss caused by the act of a wrong-doer? I think the commissioner rightly received the evidence, and that it justified his conclusion from it.

There must be, therefore, a decree in favor of the libellant, and against the respondent and his stipulator, for \$1,973.04, with interest from December 15, 1877, to this date, and costs.

CLAYTON and others v. THE SCHOONER ELIZA B. EMORY

(Circuit Court, D. New Jersey. November 10, 1880.)

1. PART OWNERS—REMOVAL OF MASTER.—The majority in interest of the owners of a vessel have the power to remove the master, whether he be a part owner or not, and to resume possession of such vessel at their own pleasure.
2. SAME—SAME—WRITTEN AGREEMENT.—In the case of a part owner only a written agreement, entitling such part owner to possession, can defeat the exercise of such right.
3. SAME—"SAILING RIGHT"—ESTOPPEL.—SPECIFIC PERFORMANCE.—A contract for the sale of a "sailing right" by the part owner of a vessel is not susceptible of specific enforcement, either by way of estoppel or by a direct proceeding for that purpose.
4. SAME—SAME—BREACH—REMEDY.—The only remedy for a breach of such contract, if any, is an action for damages.
In the Matter of the Schooner Eliza B. Emory, 3 FED. REP. 241, reversed.

Appeal by libellants from the decree of the district court in admiralty.

Flanders & Grey, for libellants.

J. Warren Cowlston, for claimants.

McKENNAN, C. J. The libellants represent the majority in interest of the owners of the schooner *Eliza B. Emory*, and have brought this suit to obtain possession of the vessel. It is not denied that, under ordinary circumstances, this right will be enforced against the minority interest in a vessel, in favor of the majority, but it is contended that John B. Clayton, whose interest must be united with that of the other libellants to make up a majority of the proprietary shares of the vessel, is estopped from asserting his right as owner, and that, therefore, a majority of the owners is not represented in the libel.

John B. Clayton was one of the original owners of the *Eliza B. Emory*, and sailed her for some time as master. In April, 1874, Clayton sold to Weeks, as respondent, one-sixteenth for \$1,750, as a "sailing right of the vessel," and executed a bill of sale in the ordinary form for the sixteenth part of the vessel. Weeks was then mate, took command, and sailed the vessel until the filing of this libel. It is alleged that the value of a sixteenth was considerably below \$1,750, and that the difference between the real value of such interest and the sum paid was the consideration of the "sailing right." Hence it is urged that John B. Clayton, having subsequently acquired another interest in the vessel, cannot gainsay the right of Weeks to retain possession of her. The only ground upon which an estoppel can be supported, if at all, is to be found in the testimony of Weeks, which is to the effect that Clayton offered to sell him one-sixteenth "as a sailing right of the vessel," and that he bought that interest at more than it was worth, because he understood that he was thereby acquiring the "sailing right;" or, in other words, that if Weeks bought a sixteenth he would thereby acquire a right to the possession of the vessel, and to sail her as master. Now this is not the statement of a fact within the knowledge of one party upon whose representation of its existence the other party relied and was misled, but it was the statement of a legal result as to which both parties might form their own judgment, as they had like means of information respecting

it. Weeks must be presumed to have known that the legal right to the possession and control of the vessel pertained to the majority interest in her, and that he could acquire the right to sail her only from this interest. He is not in a position, then, to invoke the doctrine of estoppel, because, if he has made a futile contract, with his eyes wide open, he cannot secure indemnity for a consequent loss by an unauthorized retention of the vessel.

Indefinite as is the testimony of Weeks, I think that, when the whole of the evidence is considered, it imports only an agreement, at the time of the purchase by Weeks, that he should succeed Clayton in command of the vessel. Clayton so testifies, and it is not without support in the testimony of Weeks, when he says that Clayton agreed that he should "go in her," but did not recollect what he said. I think it is more than probable that the illusory "sailing right" hath this extent no more. Accordingly Clayton turned over the possession of the vessel to Weeks, who sailed her thereafter as master, with the acquiescence of the other owners. He thus got all that he bargained for, and is without justification for his detention of the vessel.

The absolute right of the owners of a vessel to displace the master, and so reclaim possession of it, is so well settled now as to be incontestable. It rests upon reasons of public policy which are peculiarly applicable to that species of property. It may be exercised without cause, even against a master, in violation of the contract engaging him. Thus, in *Montgomery v. The Owners of the General Greene*, Bee's R. 388, Judge Hopkinson affirmed the right of the owners to dismiss, at their pleasure, a master who had been employed for a particular voyage, whose cargo was on board, for which he had signed bills of lading, and who was all ready and just about to sail. In affirming the decree the high court of errors and appeals say, (*Montgomery v. Henry*, 1 Dall. 51:) "As to the other point, the dismissal of the captain, we are of the opinion that, upon a general retainer for no particular voyage, the captain may be dismissed at any time without cause assigned;

but that where there is a charter-party, bills of lading, and a particular voyage agreed upon, though the owners may dismiss the captain, yet they would be liable in a common-law court."

But the master here is also a part owner. Does that give him any better right to hold the vessel than he would otherwise have? A decisive answer is furnished by section 4250 of the Revised Statutes. It is there enacted that the majority ownership of a vessel shall have the same power to remove a master, who is also part owner, as such majority, if owners, have to remove a master not an owner; but that they "shall not apply where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession."

This not only confers upon a majority of owners the absolute power to remove a part owner from the command and possession of a vessel, because such power is exercisable by them against one who is not an owner, but by the clearest implication it enacts that nothing but a written agreement, entitling a part owner to possession, shall be available against this right of the majority. Now, if such a contract in its most comprehensive aspect, as is alleged here, had been set up against all the libellants, would it not be clearly insufficient, under the statutes, to defeat their right to the control and possession of the vessel? Can it, then, have any greater effect against only one of them? Obviously, such a discrimination has not the slightest.

It results, therefore,—

1. That the majority (in interest) of the owners of a vessel have the power to remove the master, whether he be part owner or not, and to resume possession of her at their own pleasure.
2. That in the case of a part owner only a written agreement, entitling such part owner to possession, can defeat the exercise of such right.
3. That the contract set up here is not susceptible of specific enforcement, either by way of estoppel or by a direct proceeding for that purpose, and hence is no defence against the libel.

4. That the only remedy of the respondent for a breach of such contract, if he has any, is an action for damages. There must, therefore, be a decree for the libellants according to the prayer of their libel, which will be prepared.

VON LINGEN and others v. DAVIDSON and others.

(Libel.)

DAVIDSON and others v. VON LINGEN and others.

(Cross-Libel.)

(Circuit Court, D. Maryland. November 8, 1880.)

1. CHARTER-PARTY—"ABOUT TO SAIL."—The words "about to sail from Benizaf with cargo for Philadelphia," contained in a charter-party, held to mean, under the circumstances of this case, *about ready to sail* with cargo.
2. SAME—SAME.—Held, further, therefore, that a vessel not more than three-elevenths loaded, and the time of finishing subject to all the contingencies of wind, weather, labor, and boats incident to an open roadstead on the northern coast of Africa, was not "about to sail" within the meaning of the charter-party.

Von Lingen v. Davidson, 1 FED. REP. 178, reversed.

FACTS FOUND BY THE COURT.

(1.) The British steamer Whickham, owned by T. H. Davidson and others, the defendants in the original libel, sailed from Shields on the ninth of July, 1879, bound for Lisbon, where she arrived on the 16th, and, having discharged her cargo, sailed again in ballast on the 23d for Benizaf, on the coast of Morocco, to take a load of iron ore under a charter for Philadelphia. She passed Gibraltar on the 25th, and arrived at Benizaf at 4:30 P. M. of Saturday, the 26th. She began taking in cargo under the charter for Philadelphia during the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons, but on the 30th none, and on the 31st only four boat loads. Dur-

ing this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the seventh of August, at 5:30 p. m. An hour later the vessel sailed, and, stopping five hours at Gibraltar for coal on the 9th, arrived at Philadelphia on the second of September. She completed her unloading at that port on the 7th.

(2.) The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons burden each. It is then passed up the ship's side in baskets. Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is the only way of loading such cargo at that port.

(3.) About the first of August, Gregg & Co., a firm of ship-brokers in Philadelphia, were authorized by cable message from the owners in England to get a charter for the Whickham to carry grain from the United States on her return voyage. Not being able to do this in Philadelphia, the firm, on the first of August, telegraphed Mr. Erickson, a ship broker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel "had sailed, or was about to sail, from Benizaf with cargo for Philadelphia." The precise form of the authority given by the owners to Gregg & Co. is nowhere shown from the evidence, further than may be inferred from the telegram to Erickson.

(4.) A short time before the first of August, Schumacker & Co., of Baltimore, the original libellants, employed Mr. Ford, another ship-broker in that city, to procure them a vessel to take a cargo of grain to Europe which they were under contract to ship in August. He finding that steamers for that month were scarce, and hearing of the Whickham, took Mr. Erickson to the office of Schumacker & Co., and suggested that she might do. At the interview which then took place it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer

the purpose. Schumacker & Co., doubting whether the Whickham could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival upon the basis of the language in the telegram, and finally Schumacker & Co. agreed to take her; first, however, providing that she might be loaded in Philadelphia or Baltimore at their option, intending if she did not arrive in time for Baltimore to get her cargo under their contract at Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about 20 days. This all occurred at Baltimore on the first of August, and it does not appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel except as they were to be inferred from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibraltar, which was a day's sail away.

(5.) As soon as the bargain was concluded, Erickson sent to Gregg & Co. for a charter-party in form. They immediately sent the draft of one in which the vessel was described as "sailed from or loading at Benizaf." This Schumacker & Co. declined to accept on the ground that their agreement was for a vessel that "had sailed or was about to sail from Benizaf with cargo for Philadelphia." This being communicated to Gregg & Co. they at once sent forward a new draft to meet the wishes of Schumacker & Co., and using the language they insisted upon. This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit A, and filed with the original libel. From this it appears that in the printed blank which was used there were the following words: "Charterers to have option of canceling this charter-party should vessel not have arrived at loading port prior to —." These words were erased by drawing a pen through them before signing.

(6.) Schumacker & Co. having ascertained, on the ninth of

August, that the steamer passed Gibraltar outwards from Benizaf on that day, and being then satisfied that she would not arrive in time to load either at Baltimore or Philadelphia in August, at once set about securing another vessel, and on the 16th got one, which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Whickham of \$1,988.25. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that if Schumacker & Co. are entitled to recover at all it must be for the increase in the cost of freight which they paid.

(7.) The discharge of the cargo of iron ore from the Whickham was completed with dispatch at Philadelphia, and on the seventh of September she sailed for Baltimore, where she arrived on the 9th, and was tendered Schumaker & Co., under the charter, on the 11th. They declined to accept her for the reason that, as they claimed, when the charter-party was entered into she had neither sailed nor was about to sail from Benizaf, within the meaning of that provision in the charter, as understood by the parties. Another charter was then obtained, but at a loss to her of \$4,093.18, as of May 10, 1880. It is agreed that the charter was as favorable as any that could have been effected, and that if her owners are entitled to recover at all, it must be for the above amount as their loss.

Blackiston & Thomas, for appellants.

A. Sterling, Jr., Esq., for appellees.

WAITE, C. J. The only question in this case is whether, on the first of August, 1879, the Whickham was "about to sail from Benizaf with cargo for Philadelphia," within the meaning of that term as used in the charter sued on. The owners in England, having accepted the contract made for them by their agents in Philadelphia and Baltimore, are bound by its terms just as their agents would be were they principals. The language used must therefore be interpreted, if possible, as the parties in Baltimore understood it when they were contracting.

It is conceded that if the *Whickham* was "about to sail," giving that phrase the effect it was intended to have, Schumacker & Co. took the risk of her arrival in time to answer the purposes; but if she was not, that the warranty to that effect was broken, and her owners must make good the loss caused by the breach.

"About" is a relative term. It may indicate one thing when applied to one state of facts, and another under different circumstances. "Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretations which they, by their conduct, have given the provisions in controversy." *Lowber v. Bangs*, 2 Wall. 737. The prominent fact in this case is that a vessel was wanted to load at Baltimore in August. This was brought directly to the attention of all the contracting parties, and it was well understood that Schumacker & Co. would not take the *Whickham* unless there was a reasonable probability of her arrival in time. That the charter would not have been made if it had been known that she could not get away from Benizaf until the evening of the 7th is apparent from the fact that, as soon as it was ascertained she did not pass out from Gibraltar until the 9th, steps were taken to get another vessel in her place. In addition to this, the testimony shows that when the parties were making their calculations as to the time she would probably reach Baltimore, it was assumed that she either had sailed, or, at the latest, would sail on the next day, which was the second of August. It was not supposed that her time to Philadelphia would be less than 20 days, and this, with a reasonable allowance for unloading, could not put her in Baltimore earlier than the 28th or 29th, if she sailed as late as the 2d. Her actual time to Philadelphia exceeded the estimate, but this, if her sailing had been prompt, would have been at the risk of the charterers.

Parol evidence is not admissible to vary the terms of a written instrument, but, where ambiguity exists, it may be given in aid of interpretation to show the facts and circum-

stances in the midst of which the parties were acting. These assumptions and calculations are facts in the light of which this indefinite word is to be read. Since "about" may mean a longer or shorter period, according to circumstances, these circumstances tend to show what limitation the parties put upon it in this transaction.

Another important fact is found in the practical interpretation which the parties have, by their conduct, put on the language they have used. Gregg & Co., in Philadelphia, seem to have assumed that the vessel would be about to sail from Benizaf with cargo, within the meaning of their telegraphic authority to Erickson, if she were there loading, and they consequently, in their first draft of the charter-party, described her as "sailed or loading at Benizaf." This, however, did not meet the views of Schumacker & Co., and they declined to enter into the contract on those terms, claiming that they had agreed for a vessel that was "about to sail." In this way they, in effect, said that, according to their understanding of the language upon which they had been acting, a vessel might not be "about to sail" if she was only loading at such a port as Benizaf, and with such a cargo as she was getting there. To this suggestion Gregg & Co. apparently assented without objection, for they immediately sent forward the new charter-party, with their signature affixed, in which the vessel was described in accordance with the language they had used in their telegram to Erickson. Such conduct shows clearly that the word "about" was used advisedly, as indicating some shorter period of time than loading would necessarily imply.

Under these circumstances it seems to me clear that the parties must have understood their language to mean that the *Whickham* had either sailed or was *about ready* to sail with cargo. It is difficult to reconcile any other interpretation with the undisputed facts in reference to which the parties were acting. Taking this as the effect of the contract, I have had no difficulty in reaching the conclusion that the vessel was not in the condition she was represented to be. Her carrying capacity was something over 1,100 tons. Her

cargo was iron ore, which could only be put on board in a particular way, and by hand, without the use of machinery. Less than 300 tons were then in, and although the utmost diligence was employed the remainder was not got on board until late in the sixth day afterwards. In short, she was not more than three-elevenths loaded, and the time of finishing was subject to all the contingencies of wind, weather, labor, and boats incident to an open roadstead on the northern coast of Africa. Certainly in this condition she could not be considered as ready to sail. At most she was only loading, with the time of her sailing to a great extent uncertain. It is true that the term "about" implies in such a connection the lapse of some time, but not enough, as it seems to me, in this case, to enable the vessel to do what was required of her to put herself in a condition to sail with cargo under her charter from Benizaf to Philadelphia.

It follows that the original libellants are entitled to recover, and that the cross-libel must be dismissed. A decree may be prepared accordingly.

CONCLUSIONS OF LAW.

1. That the Whickham was not about to sail from Benizaf on the first of August, within the meaning of that term as used in the charter-party.
2. That Schumacker & Co. are entitled to recover from the defendants to their libel the sum of \$1,988.25, and the interest thereon from September 11, 1879.
3. That the cross-libel of T. H. Davidson and others must be dismissed.

SMITH v. McKAY and others.

(Circuit Court, E. D. Michigan. November 9, 1880.)

1. REMOVAL—PETITION—PARTIES—ACT OF MARCH 3, 1875, § 2, FIRST CLAUSE.—The first clause of the second section of the removal act of March 3, 1875, relates only to cases in which there is a single, indivisible controversy, and in which all the individuals upon the moving side are necessary parties to such controversy. In such case all of the individuals upon such side must unite in the petition for removal.
2. SAME—SAME—SAME—ACT OF MARCH 3, 1875, § 2, SECOND CLAUSE.—The second clause contemplates cases in which there are persons whose presence is not necessary to the determination of the main controversy; in which case either one or more of their co-parties may petition for removal, though all be citizens of the same state.
3. SAME—SAME—SAME.—Hence, where A., a citizen of New York, sued B., C., D., E., and F., citizens of Michigan, and B. filed a petition for removal, alleging that the controversy was wholly between the plaintiff and B., C., D., and E., and that F. was not a necessary party to the trial of such controversy, *held*, that the case was properly removed.

Motion to Remand.

This was an action of replevin originally commenced in the state court by John L. Smith, a citizen of the state of New York, against John McKay, Eugene Robinson, Jesse H. Farrell, Henry Rose, (impleaded as John Doe,) and J. P. Johnson, all citizens of the state of Michigan. The petition for removal was made by defendant McKay alone, and set forth, in addition to the other material allegations, that he was "a citizen of the state of Michigan; that Eugene Robinson, Jesse H. Farrell, Henry Rose, (impleaded as John Doe,) were and are also citizens of the state of Michigan, and that the controversy in said suit is and the issues are wholly between the plaintiff, the petitioner, and the other defendants above named; that the said defendant J. P. Johnson is not a necessary party to or in the trial of said controversy or issues, or any of them, and said Johnson also was and is a citizen of the state of Michigan." Motion was made to remand upon the ground that only one of the defendants petitioned for the removal.

Beakes & Cutcheon, for motion.

Moore & Canfield, for petitioning defendant.

BROWN, D. J. This suit was removed under the second section of the act of March 3, 1875. This section provides for the removal of suits between citizens of different states in two classes of cases: *First*, cases in which there shall be a controversy between citizens of different states, in which case "either party" may remove the suit into the proper circuit court; *second*, cases in which there shall be a controversy "between citizens of different states, and which can be fully determined as between them," in which case "either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the circuit court of the United States."

In construing the first clause of this section it has been uniformly held that the words "either party" comprehend all the individuals upon one side of the controversy, and that all such individual parties must unite in the petition. *The Removal Cases*, 100 U. S. 457; *C. & St. L., etc., R. Co. v. Maccomb*, 9 Rep. 569; *Ruckman v. Palisade Land Co.* 1 Fed. Rep. 367; *In re Fraser's Estate*, 6 Rep. 357; *National Bank v. Dodge*, 25 Int. Rev. Rec. 304.

These decisions were a mere application to the act of 1875 of the rule which had obtained with reference to removal under previous acts. Under the judiciary act of 1789 it had been well established that all of the defendants must unite in a petition for removal. *Smith v. Rines*, 2 Sum. 338; *Beardsley v. Terrey*, 4 Wash. 286; *Ward v. Arredondo*, 1 Paine, 410.

The second clause of section 2, under which the removal of this case must be supported, if at all, was undoubtedly intended to apply to a different class of cases from those mentioned in the first clause; otherwise the first clause is unnecessary. The first clause, as well as the second, contemplates a controversy wholly between citizens of different states, and which can be fully determined as between them. But it would not be consonant with sound principles of construction to say that both of these clauses meant the same thing, and gave the parties the option of petitioning jointly or severally. The second clause evidently contemplates not only a controversy

wholly between citizens of different states, and which can be fully determined as between them, but the existence of other plaintiffs or defendants who are not necessary to such controversy. We understand this to be conceded by both sides. The real question is whether such other plaintiffs or defendants shall be citizens of different states from the other co-plaintiffs or co-defendants. The plaintiff in this case insists that, inasmuch as all of the defendants are citizens of the state of Michigan, they must all unite in the petition, and that it could only be upon the hypothesis that Johnson, whose presence is not necessary to this controversy, is a citizen of the same state with the plaintiff. That would entitle one or more of the other defendants to remove the case under the second clause. On the other hand, it is claimed that the first clause only applies where all of the defendants are necessary parties to the controversy, in which case it is admitted that all must join; but that, if there is a defendant who is not a necessary party to this controversy, the other defendants, or either of them, may petition for the removal, although such non-interested defendant may be a citizen of the same state with themselves. It is very probable that, in enacting this section, the legislature had in mind the existence of defendants whose citizenship would prevent a removal of the case by the other defendants; but the language of the act bears no such construction.

The fact that the more interested defendant shall be a citizen of the same state with the plaintiff, or of any other state than the other defendants, is nowhere suggested in that clause, and any such construction would require us to interpolate words which are not there found.

Such a restriction is found in the removal act of 1867, (Rev. St. § 639, subd. 2.) By this subdivision a removal is provided for when the suit is by a citizen of the state wherein such suit is brought against a citizen of the same state and a citizen of another state, in which case it may be removed, as against such citizen of another state, upon his petition; if, so far as it relates to him, the suit is brought for the purpose of

restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. Now, if the second clause of the second section of the act of March 3, 1875, was intended to cover cases of this kind, it would have been natural and easy to repeat the language of the act of 1867. Instead of that, however, we find that it is only necessary that there shall be a controversy wholly between citizens of different states, and which can be fully determined, as between them, without the presence of other plaintiffs or defendants who may have been joined with them as parties to the case. If it were otherwise, then the presence of the unnecessary defendant, who might be unwilling to have the case removed, could in any case prevent such removal.

Upon a careful reading of this section I have concluded that the first clause relates only to cases in which there is a single indivisible controversy, and in which all the individuals upon the moving side are necessary parties to such controversy. In such case all of the individuals upon such side of the controversy must unite in the petition. The second clause contemplates cases in which there shall be parties whose presence is not necessary to the determination of the main controversy, in which case either one or more of their co-parties may petition for removal, even though all be citizens of the same state.

This is the case set forth in the petition for removal in this cause, and the motion to remand must, therefore, be denied.

BEHR v. CONNECTICUT MUT. LIFE INS. CO.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. **NEW TRIAL—CHARGE OF THE COURT—WEIGHT OF TESTIMONY.**—The court may comment on the facts, but, in doing so, should be careful not to assume to decide the matter of fact itself, nor to take from the jury the right of weighing the evidence and determining its force and effect to prove the entire issue. Therefore, an instruction which, in seeking to explain the meaning of certain words or phrases, overlooks or ignores all the proof offered by the other side, and calls the attention of the jury only to the strong features in the party's own favor, was properly refused as a charge upon the weight of testimony, and a new trial should not be granted for such refusal.
2. **EVIDENCE—ESTOPPEL BY A SWORN STATEMENT—RULE STATED.**—It is misleading a jury to call the rule of public policy which concludes a party from contradicting her oath deliberately made, in the course of judicial proceedings, an *estoppel*. It is an established rule of evidence in Tennessee that such an oath, made with a *wilful intention to swear falsely*, cannot be contradicted; but it does not operate as an *estoppel* unless the opposite party has acted upon it, or been prejudiced by it, in which case it cannot be contradicted at all, however innocently made. Where, however, it does not assume the character of a technical *estoppel*, the jury may find the truth from the proof at large, if the party shows satisfactorily that the oath was not made with the intention to swear falsely.

Motion for New Trial.

The plaintiff having sued the defendant company on a policy of life insurance, and procured a verdict and judgment for \$2,881, the defendant moved for a new trial. The defence was that at the time the policy issued the life assured, contrary to the warranty in the policy and application, was addicted to the use of spirituous liquors; that after it issued he acquired the habit of intemperance so as to impair his health or produce *delirium tremens*, and that he committed suicide by drowning. Prior to the death of her husband the plaintiff filed in the proper state court a petition for divorce, on the ground of habitual drunkenness, in which she stated that her husband had been for *four years* an habitual drunkard and for *two years* subject to *mania a potu*. This petition, being sworn to, was introduced in evidence by the defendant company against the plaintiff, and, if true, conclusively established that he was a

drunkard at the time the policy issued, and had subsequently had *mania a potu*, which, it was proved, is synonymous with *delirium tremens*. Being introduced as a witness on this trial, she swore that the facts stated in the petition for divorce were not true, and that her husband had never acquired habits of intemperance until after the policy was issued; and much proof was introduced on both sides tending, in behalf of the plaintiff, to corroborate her present statement, and, in behalf of the defendant, that made in the petition for divorce. In attempted explanation she introduced proof of her being a foreigner, born and educated in France, and having an imperfect knowledge of our language; that she was in great distress mentally; was rendered, both herself and children, wretched by the habits and conduct of her husband, as well as being reduced to want and suffering. She swore that it was a *mistake* she made in telling her lawyer that her husband had been so long a drunkard; that the lawyer wrote the petition, and she swore to it without knowing the force and effect of the words used, or detecting the mistake.

The lawyer swore that the husband was his own relative; that he and other friends advised the application for divorce, and was told by her that the facts were as stated in the petition, except that, having seen the ravings of the husband, he himself named it *mania a potu*, and thought it was such. He further said that the language of the petition was his own, but that he read it over to her and she swore to it. He also testified that of his own knowledge the husband was a temperate man in 1869, when the policy issued, and it did not occur to him, at the time he wrote the petition for divorce, that the fact of his being a drunkard as far back as the petition stated was not true. There was much other testimony *pro* and *con* upon this and all the issues made by the pleadings, but it is sufficiently stated above to indicate the points made upon this motion for a new trial.

Among other things the court charged the jury as follows: "If you believe the facts stated in the petition for divorce to be true, it is an end of this case and the plaintiff cannot recover. It proves, if true, conclusively, that the life assured

was addicted to habits of intemperance at the time the policy was issued, and that he subsequently had *delirium tremens*. But if you find there is evidence tending to show that the facts stated in that petition are not true, or only partially true, the question then arises, what force and effect shall you give to the petition? It is contended by the defendant company that Mrs. Behr, the plaintiff here, cannot gainsay it; that she is estopped to deny it, whether true or false. There is, undoubtedly, a principle of law which holds one to his oath, whether it be true or false, very rigidly under certain circumstances. If one swear falsely to a state of facts, and you act on it, so that if he be allowed to deny it you are prejudiced, it is an estoppel, and he will not, under any circumstances, be allowed to deny it, no matter how innocent he be. But there is no evidence in this case that the defendant company has in any way been prejudiced by this oath of Mrs. Behr to the petition. The company has not acted on it, nor suffered by it, and I do not think the rule of estoppel applies to it for that reason.

"But there is a further principle of law to be considered, which may apply, and it is for you to determine how the fact is in this case. It is a rule of public policy that if one wilfully and deliberately swears falsely, whether anybody acts on it or not, or is prejudiced or not, he cannot be heard in a court of justice to swear to the contrary when his interest demands that he shall change his oath. But if he has inadvertently or mistakenly sworn to a state of facts which he now says is not true, and he proves to your satisfaction that he is innocent of the offence of intentional false swearing, you may look to the proof at large and say how the facts really are. If, therefore, you find from the facts in this case that Mrs. Behr has explained satisfactorily to you how she came to make an oath which she now says is not true, and you are of opinion that she is innocent of making a wilfully and deliberately false oath to obtain a divorce, then, and only then, will you be allowed to look at the other proof in the case. That is the first question for you to determine. If you find it against her she cannot recover.

"But, assuming that you have determined that question in

her favor, then you may look to all the proof, including her admissions in that petition, and say how the truth is. Admissions under oath, made with a knowledge of the facts, are the very highest order of testimony and deserve great weight at your hands. You are to look to the admissions in the light of the surrounding circumstances; to her condition mentally; to the nature and character of her means of information; to the fact that the document is a legal proceeding, drawn by a lawyer and read over to her by him; to the extent of her understanding of the language used; to the object and character of the petition itself, and to every fact and circumstance found in the proof adding strength to or detracting from the sworn statement, and say what weight you will give to it under all the circumstances. Having thus weighed the admission, you will in the same way look to the other proof in the case, weigh it in the same manner, and say whether the facts be as the plaintiff now claims them to be, or as the defendant says they are. If you find that Behr, the deceased, was, at the time he took out the policy, addicted to the use of ardent spirits, the plaintiff cannot recover; or, if you find that he subsequently acquired the habit of intemperance, so as to impair his health or produce *delirium tremens*, she cannot recover."

The court also refused to give the following charges asked by the defendant company, viz.:

"Ordinarily, a party having made a sworn statement of facts in the course of a judicial proceeding, (as, for instance, such a statement as is made in the petition for divorce filed by Mrs. Behr, and given in evidence in this case,) is absolutely bound by such statement, and estopped from showing that such statement was not true. This doctrine has its foundation in the obligation under which every person is placed to speak and act according to the truth, and in the policy of the law to suppress the mischiefs that would arise if men were permitted to deny that which, by their solemn and deliberate acts, they have declared to be true. The conclusive effect of such statements can only be obviated by clear proof that they were made inconsiderately or by mistake.

"If the statements were made *deliberately*, as if the facts were communicated to counsel with a view to be incorporated in a petition for a divorce, and that the petition, after being prepared, was read over to the party by her counsel, and then adopted and sworn to, they cannot be said to have been made *inconsiderately*. If the facts were peculiarly within the personal knowledge of the party making the statements, and if she was not ignorant in regard to the truth or falsehood of the facts, then the sworn statements cannot be said to have been made by *mistake*. A mistake, to have the effect of removing the estoppel, must, at all events, be an *innocent* and *excusable* mistake—arising from imperfect knowledge or information. If the party knows the facts and misstates them, the estoppel concluded her from showing that her statement was untrue. It is not sufficient to prove that the sworn statement was untrue. There must be some satisfactory reason shown why the truth was not stated in the first instance, and the reason shown must be sufficient to establish the fact that the misstatement was innocently made, under excusable ignorance of the actual facts."

Humes & Poston, for plaintiff.

Estes & Ellett, for defendant.

HAMMOND, D. J. The errors assigned on this motion are that the idea of *estoppel* was carefully excluded from the jury; that the conclusiveness of the sworn statement was made to depend wholly upon whether or not the plaintiff had been guilty of the offence of wilful and deliberate false swearing, and the court refused to explain, as asked by the instruction, what is meant by "inconsiderately" and "by mistake" making a false statement. It seems to me that so much of the instruction as sought to explain the meaning of the words "*deliberately*," "*inadvertently*," and "by mistake" is asking the court to take from the jury certain questions of fact in the case, and to determine them as a matter of law. It is certainly charging the jury upon the weight of the testimony, and expressing an opinion by the court that, under the circumstances stated in the instruction, the sworn statement was made *deliberately*, and not *inconsiderately* and by mis-

take. The court may comment on the facts to aid the jury in reaching a just conclusion, but should be careful, in doing so, not to assume to decide the matter of fact itself. *Farmers' Bank v. Harris*, 2 Humph. 311; *Burdell v. Denig*, 92 U. S. 716; *Life Ins. Co. v. Baker*, 94 U. S. 610.

The charge refused overlooks the proof for the plaintiff, and, calling the attention of the jury to the strong features in the defendant's favor, asks the court to say to the jury that there was deliberation in making the statement, and no inadvertence or mistake. It is not competent for the court, where there is evidence tending to prove the entire issue, although it is conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect. *Weightman v. Washington City*, 1 Black, 39, 49; *Greenleaf v. Birth*, 9 Pet. 292; *Crane v. Morris*, 6 Pet. 598, at p. 617; *Lucas v. Brooks*, 18 Wall. 436.

It is very difficult in some cases to determine whether an instruction is on the facts or the law of a case, and its correctness must depend on the phraseology used; but where the jury is instructed as to what their verdict shall be on the particular point, it is a direction on the effect that they shall give to the evidence. *Tracey v. Swartout*, 10 Pet. 80.

A careful reconsideration of this charge strengthens the conviction I entertained at the time it was refused, that it is a partial statement of the facts, accompanied with an expression of opinion by the court as to the effect of those particular facts upon the general fact in dispute—namely, whether Mrs. Behr made her statement under oath deliberately, and without inadvertence or mistake. The charge was therefore properly refused.

The other errors assigned proceed upon the theory that the petition for divorce was an estoppel, and the court erred in not saying so to the jury. Undoubtedly the supreme court of Tennessee, in *Hamilton v. Zimmerman*, 5 Sneed, 40, 47, calls the principle which concludes a party by his sworn statement erroneously, I think, when applied to a case like this, an *estoppel*; and the subsequent cases, following the language of that case, continue to call it so. *Cooley v. Steele*, 2 Head,

605, 608; *Tipton v. Powell*, 2 Cald. 19, 23; *McCoy v. Pearce*, Thomp. Cas. 145, 148; *Seay v. Ferguson*, 1 Tenn. Ch. 287; *Ament v. Brennan*, Id. 431; *Nelson v. Claybrook*, (Jackson, 1880,) MSS. not yet reported.

But all these cases show that it is not an *estoppel*, because, with one accord, they say that, "if made inconsiderately or by mistake, the party ought certainly to be relieved from the consequences of his error." Now, the distinguishing feature of an *estoppel* is that under no circumstances can it be averred against; it is not susceptible of explanation and often speaks against the truth, and for this reason has been regarded as odious. It was given that name "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Bigelow, Estop. 44. Such a sworn admission may become an *estoppel*, as it may, whether sworn to or not, if parties act on it, or would be prejudiced by it; and, perhaps, in cases where no explanation can be given, and the party is caught in deliberately attempting to cross himself in swearing two contrary ways about the same fact, it may, in one sense, be called an *estoppel* to hold him to his first oath and not permit him to gainsay it. But this very case shows that it is misleading to call it so, and because it has been done we are now asked to predicate more upon the name given than is justified by the cases so much relied on, and to extend the principle settled by them far beyond what the supreme court ever intended.

It would make a most odious *estoppel* to forever hold a party to a falsehood, whether any one has been injured by it or not. After all, it is only a question of the force and effect of the petition for divorce as a part of the proof, and when once it is admitted that, under any circumstances, the contrary can be shown, it cannot be called an *estoppel*; and it seems to me to be giving the adverse party an unfair advantage to call it so, and likely to mislead the jury to the detriment of one who may be innocent of false swearing. In deference to these cases, which have established a rule of evidence binding on this court, as well as all others in Tennessee, I charged the jury that the plaintiff here was bound

by her oath unless she could show, to the satisfaction of the jury, that she had not wilfully made a false oath in the first instance. This is all that the cases cited mean, in my opinion, and all else that is claimed for them is based upon an inference drawn from the use of the word "estoppel." I have found none, and doubt if any cases elsewhere will support the doctrine that a man is ever bound by a false oath so that he cannot show the truth as between himself and others who are strangers, and have been neither injured nor prejudiced by the original falsehood.

The general rule elsewhere is not in accordance with the Tennessee cases. 1 Greenl. Ev. §§ 210-212. But in the charge I gave to the jury I have followed the cases strictly in all except calling the principle enunciated an estoppel. It is immaterial by which name it is called, perhaps, but more was sought to be implied from the word than the cases themselves justified, and it seemed to me necessary to discard it as misleading. In view of what was actually said to the jury on the subject, it seems to me that no error was committed of which the defendant can complain.

The fact that the jury were told that they could not look to the proof at large unless they acquitted the plaintiff of any intentional and wilful false swearing, it is argued, called for a trial as if upon an indictment for perjury, and the jury were led to believe that they would, by finding against her, substantially fasten upon her the odium of perjury or false swearing, and were thereby led to prejudice the defendant's case by giving more effect to the plaintiff's proof than they should have done, and less to that of the defendant than they would have done if they had been told that they must simply determine whether she had made the oath deliberately and with full knowledge of the facts, or under circumstances showing that she made it inadvertently or by mistake.

There is much force in this objection to the charge, and it illustrates the inconvenience of applying the analogy of estoppel to the mere process of weighing testimony. The cases cited all show that there is a preliminary question to be tried, namely, whether there was an innocent mistake made. It is

to be determined whether the party shall, in obedience to public policy, be precluded from contradicting his original oath. He is not to be so precluded unless he has, deliberately and with full knowledge, taken the oath without inadvertence or mistake on his part. If he has done this he cannot contradict or offer proof of others to contradict it. It is in the nature of a penalty, and a very serious one, for false swearing. It seems to me plain that it is proper to say to the jury that, in trying this question, they must find a wilful and deliberate false swearing to justify them in inflicting it. Nothing less should work the serious consequence of closing the plaintiff's mouth, so that, although her husband had been, in fact, a drunkard for only a year, for example, she must stand by her false statement that he had been such for four years, and thereby lose a policy to which there is no defence if she could show the truth.

The charge given is a necessary result of the doctrine invoked, and the law of these cases, in my opinion, requires that this *conclusiveness* of the false oath shall not obtain unless the public policy against false swearing requires it. I sought to avoid the effect complained of in the charge, by telling the jury that after they had determined the preliminary question in favor of the plaintiff, they would *then* look at the admission under oath as an admission of great weight, and determine the force and effect of it in behalf of the defendant. The charge is very favorable to the defendant in that respect, and I think the jury understood that after they had tried the question of wilful false swearing, they should give the petition for divorce the fullest weight it was entitled to as an admission by her going to prove the defendant's case. I have no doubt from the proof that the plaintiff did make a mistake in swearing that her husband had been a drunkard four years, and think it is fairly proved that he was a temperate man when he took out the policy. The proof is not so clear as to the extent of his subsequent habits, but the jury has found that they did not impair his health or produce *delirium tremens*, and I am satisfied with the finding, as also upon the issue of suicide.

It is plain, therefore, that in this case the plaintiff, in her petition for divorce, made statements which were not true, yet would defeat her recovery on this policy. It not is difficult to apply the rule of public policy, call it an *estoppel* if you will, to a case where the principle of protecting the courts against false swearing is called for by the facts developed; but, on the other hand, when the proof tends to show an unfortunate misstatement of the facts, it becomes a matter of serious concern to so direct the jury that they shall not hold the party to the misstatement without a clear case which calls for such punishment. On the whole, I am satisfied with the verdict, and overrule the motion for a new trial.

RECLAMATION DISTRICT No. 108 v. HAGAR.

(Circuit Court, D. California. November 8, 1880.)

1. **ASSESSMENT—DUE PROCESS OF LAW.**—Whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for public uses, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

Davidson v. New Orleans, 96 U. S. 97, 105.

2. **SAME—SWAMP LANDS—STATUTE OF CALIFORNIA.**—A statute of California, relating to the reclamation of swamp lands, provided that commissioners should "jointly view and assess, upon each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the benefit which would result from such works." *Held*, that this provision certainly seemed to require an apportionment of assessments according to benefits.
3. **SAME—SAME—SAME—CONSTRUCTION.**—*Held, further*, that the question was one of constitutional law, arising wholly under the state constitution, and therefore concluded by the decisions of the supreme court of the state.

4. SAME—SAME—SAME—CONTRACT.—*Held, further*, that the statute authorizing the assessment in question did not violate the obligation of any contract between the United States and California, or the United States and her patentees or grantees, or between the state of California and purchasers from her, or grantees of the United States, or any contract found in the charter of the plaintiff.
5. SAME—SAME—SAME—SAME—GOLD COIN.—*Held, further*, that the authorizing the assessments to be collected in gold coin did not impair the obligation of any contract.
Lane Co. v Oregon, 7 Wall. 73.
6. SAME—SAME—SAME—"INCIDENTAL EXPENSES."—*Held, further*, that attorney and counsel fees, in prosecuting suits for the recovery of such assessments, are "incidental expenses," within the meaning of the statute, to be paid out of the funds raised, although such statute makes it the duty of the district attorneys to prosecute such actions.
7. DISTRICTS FOR THE RECLAMATION OF SWAMP LANDS—STATE OF CALIFORNIA—POWER OF LEGISLATURE—SOURCE OF TITLE TO LANDS.—The power of the legislature of the state of California to authorize the formation of districts for the reclamation of swamp lands within the state at the expense of the lands so reclaimed, is not dependent upon the source or channel through which the title to such lands came.

A. C. Adams, F. E. Baker, and W. B. Treadwell, for plaintiff.

W. C. Belcher and I. S. Belcher, for defendant.

SAWYER, C. J. The first point made against the validity of these proceedings, and elaborately argued, is disposed of by the supreme court of the United States in *Davidson v. New Orleans*, 96 U. S. 97, in which it is held that "whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for public uses, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by

the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." With reference to that case the court further observes: "Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object, should be served on all owners who were known and within reach of process, and an advertisement made as to those who were unknown or could not be found. This was complied with; and the party complaining then appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the supreme court. *If this be not due process of law, then the words can have no definite meaning as used in the constitution.*" Id. 105.

So, in this case, no property can be taken from the party except upon a judgment, after a full hearing in a suit to recover the amount of the assessment, in which the legality of all the proceedings is contested and adjudged. That is the very purpose of the present suit, and we are now engaged in ascertaining the validity or non-validity of the assessment in the regular course of due process of law. The assessment does not take the property; it is only taken in pursuance of the judgment after a full hearing. The case cited is conclusive on the point.

The second point relied on by the defence is that the assessment was made, and the law authorized it to be made, without regard to any known or just principle of apportionment, or equality of burden or apportionment.

I do not understand it to be claimed that it was not made in accordance with the statutory provisions in section 33 and other sections; but it is claimed that the statute itself is unconstitutional and void on the grounds indicated. I am not prepared to say that the statute does not require the assessment to be so made as to have some just relation to the benefits resulting from the improvement. The provision is that the commissioners "shall jointly view and assess, upon each and every acre to be reclaimed or benefited thereby, a

tax proportionate to the whole expense, and to the benefit which will result from such works." Section 33. This certainly seems to require an apportionment according to benefits. But suppose it does not require the apportionment to be strictly in all particulars in accordance with the benefits, then this point presents a question of constitutional law arising under the state constitution; and the decisions of the supreme court of the state upon such questions are conclusive upon this court when they do not trench upon any of the rights protected by the constitution of the United States. *Hawes v. Contra Costa Water Co.* 5 Sawy. 287; *Walker v. State Harbor Co.* 17 Wall. 650; *Bailey v. Magwire*, 22 Wall. 230; *South Ottawa v. Perkins*, 94 U. S. 260; *State R. Tax Cases*, 92 U. S. 575; *Fairfield v. Gallatin Co.* 100 U. S. 47. In *Davidson v. New Orleans* the supreme court says: "It is said that plaintiff's property had been previously assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the state to tax or assess property twice for the same purpose, we know of no provision in the federal constitution which forbids this, or which forbids unequal taxation by the states." *Davidson v. New Orleans*, 96 U. S. 106. The question, then, rests upon the state constitution as construed by the highest court of the state, and those decisions are against the defendant. This very point seems to me to be determined in *Hager v. Sup'rs of Yolo Co.*, (arising under this same act,) 47 Cal. 234-5; *Burnett v. Mayor of Sacramento*, 12 Cal. 76; *Emery v. S. F. Gas. Co.* 28 Cal. 345; and subsequent cases affirming it settle this question in this state.

The next point relates to impairing the obligation of a contract. I am unable to find any contract, either between the United States and California, or the United States and her patentees or grantees, or between the State of California and purchasers from her, or grantees of the United States, the obligation of which is impaired by the law authorizing the assessment in question. Nor do I think there is any contract found in the charter of the Reclamation District, the obligation of which could be impaired, within the meaning of the constitution, by reason of the fact that the assessment was

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levied in violation of the provisions of section 7 of the by-laws, which provides that "the trustees shall allow no indebtedness to accrue in excess of the amount of assessment levied." A similar question seems to have been raised in *Davidson v. New Orleans*, and overruled by the state court, which ruling was sustained by the supreme court of the United States. Says the latter court: "If the act under which the former assessment was made is relied on as a *contract against further assessments for the same purpose*, we concur with the supreme court of Louisiana in being unable to discover such a contract." 96 U. S. 106.

In case the first assessment proves insufficient to pay the expenses of a reclamation once inaugurated, the statute itself authorizes a second assessment to be made to make up the deficiency; and the supreme court, in one of the cases arising under this act already cited, holds such second assessment under the act to be valid, notwithstanding the provision in the by-laws now under consideration.

In my judgment, the authorizing the assessments to be collected in gold coin did not impair the obligation of any contract. The states are authorized to require taxes and assessments to be collected in coin if deemed expedient. *Lane Co. v. Oregon*, 7 Wall. 73. Gold coin is lawful money of the country, and is legal tender in payment of debts. The statute itself makes no distinction between it and other lawful money also made a legal tender.

I need not inquire whether Reclamation District No. 108 could successfully set up the statute of limitations to any portion of its indebtedness. The defendant is not in a position to raise the question as a defence to this action. The statute might run against its patient creditors, while the Reclamation District is earnestly and vigorously pressing its suits to collect the assessments in order to enable it to pay its debts.

The expenses of collecting the assessments, among which are proper attorney and counsel fees in prosecuting suits for their recovery, are, in my judgment, proper "incidental expenses," within the meaning of the statute, to be paid out of the funds raised; and the fact that the statute makes it the

duty of district attorneys to prosecute such actions, does not prevent the employment of other counsel, in the sound discretion of the officers of the district, in proper cases, to aid in the litigation. *Smith v. Sacramento*, 13 Cal. 532; *Hornblower v. Duden*, 35 Cal. 668-9. This identical point is said, in complainant's brief, and not denied by defendant, to have been decided by the supreme court of California, December 29, 1879, in three cases: *Reclamation Dist. No. 108 v. Hickock*, *Same v. Howell*, and *Same v. Howell et al.* If so, the determination is authoritative.

The supreme court of California have settled the question that, under the constitution of California, the legislature has power to authorize the formation of districts for the reclamation of swamp lands within the state, at the expense of the lands so reclaimed. *Hagar v. Sup'rs Yolo Co.* 47 Cal. 223; *People v. Hagar*, 52 Cal. 171; *People v. Reclamation Dist. No. 108*, 53 Cal. 348; *Dean v. Davis*, 51 Cal. 407. This being established, I have no doubt of its authority to include swamp lands which are derived under Spanish grants, or under any other patent from the United States, as well as those derived through the state under the Arkansas act granting the swamp lands to the several states in which they are situated.

The power to reclaim at the expense of the lands no more depends upon the source from or channel through which the title came, than the power to authorize the improvement of the streets of a city at the expense of the adjoining property. There is no contract that lands patented by the United States upon grants to purchasers, or derived from Mexican grants and protected by the treaty, shall be exempt from the burdens imposed upon other property under the police or the taxing powers of the state. The state does not derive its power to reclaim swamp lands from the Arkansas act; nor does it contract by that act not to reclaim other swamp lands, or to limit the expense of reclaiming to the proceeds of sales of those particular lands. Its power to reclaim is wholly independent of the provisions of that act. By accepting the grant it may have imposed upon itself the duty to reclaim the lands granted, but it thereby in no way limited its power

derived from other sources to reclaim those or any other lands. The several swamp-land cases already cited, arising under the act in question, also decide that the legislature has power to include lands held under Mexican grants in reclamation districts.

The point that, conceding the power of the legislature to include the lands of Hagar, held by him under a Mexican grant, in a district formed for the purpose of reclamation, still it did not in fact so include them by the act of 1868, or the provisions of the political code in question, is distinctly decided against the defendant by the supreme court of the state in *Hagar v. Sup'rs Yolo Co.* 47 Cal. 223; *People v. Hagar*, 52 Cal. 172. This being a construction of a statute of California by the highest court of the state, is conclusive upon this court. The last point, that the assessment is void because not made according to any rule of benefits, etc., has already been considered under another head, and it is disposed of by the authorities already cited. See, particularly, *Hagar v. Sup'rs Yolo Co.* 47 Cal. 233-4; *People v. Hagar*, 52 Cal. 183; *Davidson v. New Orleans*, 6 Otto, 107. No other point appears to me to require special notice. All the questions presented in this case, upon which there ever could have been grounds for reasonable doubt, are, in my judgment, authoritatively settled, either by decisions of the United States supreme court or the supreme court of the state of California.

There must be a decree for complainant, in pursuance of the prayer of the bill, and it is so ordered. Similar decree in the three other cases.

BURTON v. THE TOWN OF KOSHKONONG.

(Circuit Court, W. D. Wisconsin. ———, 1880.)

1. STATUTE OF LIMITATIONS—COUPON ATTACHED TO BOND.—A bond, dated January 1, 1857, provided for the payment of interest semi-annually until the principal was paid. Coupons for such semi-annual interest were attached to the bond. *Held*, in an action upon such bond, in the state of Wisconsin, that the statute of limitations had no application to the coupons falling due more than six years previous to the commencement of such action.

Amy v. Dubuque, 98 U. S. 470, and *Clarke v. Iowa City*, 20 Wall. 583, distinguished.

2. COUPONS ATTACHED TO BOND—INTEREST UPON INTEREST.—*Held*, further, that under the laws of the state of Wisconsin, as they existed at the time the bond was executed, all coupons attached to such bond should bear interest at the rate of 7 per cent. from the time they were due.

Miller v. Jefferson, 20 Wis. 54.

3. CONTRACT—OBLIGATION—REMEDY.—Any change in the remedy which practically cuts off a portion of the cause of action, or renders the contract of less available worth, is as much within the constitutional prohibition as a law which strikes directly at the contract itself.

Edwards v. Kearseley, 96 U. S. 595.

———, for plaintiff.

———, for defendant.

BUNN, D. J. This action came on for trial at the present term before the court, a jury trial having been waived by stipulation. The action is upon two railroad bonds, for \$1,000 each, dated January 1, 1857, issued by the defendant town to the Chicago, St. Paul & Fond du Lac Railroad Company, payable in 20 years, with 8 per cent. interest semi-annually until the principal is paid. Coupons for the semi-annual interest are attached to the bond, the first two only of which have been paid. The defendant pleads the statute of limitations to all those coupons falling due more than six years previous to the commencement of the action. The case is submitted upon the complaint and answer, and there are two questions to be decided—*First*, is the plea of the statute of limitations good? *Second*, is the plaintiff entitled to recover, under the laws of Wisconsin, interest upon the

interest represented by the coupons from the time of falling due?

Upon the first question, I think, the suit being upon the bonds themselves, which in the body thereof provide for the payment of interest semi-annually until paid, the statute of limitations has no application to the case. The object of attaching warrants for the payment of the interest as it falls due, is to give commercial character and value to the bonds, by enabling the holder to detach them for presentation and payment when due, or to sell them as commercial paper before due; or, if not paid when due, to enable the holder thereof to bring a separate action to recover the amount represented by them. It is a mere matter of commercial convenience. They are part and parcel of the bond itself until detached therefrom, or separate suit brought upon them. If relied upon as an independent cause of action, and a separate suit is brought upon them, undoubtedly, the six-year statute of limitations might be pleaded. *Amy v. Dubuque*, 98 U. S. 470. But the holder is not compelled to bring separate suit upon the coupon, but it is optional with him to do so, or wait until his bond falls due, as in this case, and then sue for principal and interest, basing his action upon the bond, and not upon the coupons, or upon the bond and coupons as constituting one entire cause of action. It seems to me this holding is entirely consistent with the case of *Amy v. Dubuque*, above referred to, and *Clark v. Iowa City*, 20 Wall. 583.

Suppose no coupons had been executed, and the bond had provided, as this now does, for the payment of interest semi-annually, the rule would be just the same. An action might be maintained every six months to recover the interest if not paid. But no one would suppose it to be *necessary* to bring such action in order to prevent the statute from running upon the interest, or that it would not be optional with the holder to wait until the bond fell due and recover principal and interest for the entire time. If there were no provision in the body of the bond itself for the payment of semi-annual interest, and the plaintiff had to rely upon the coupons, the case would be different.

The other question I think, upon careful consideration, must also be resolved in favor of the plaintiff. The question, like that of the statute of limitations, is one of local law. See *Amy v. Dubuque*, 98 U. S. 470; *Cromwell v. County of Sac*, 96 U. S. 51.

The supreme court of Wisconsin, in *Mills v. Jefferson*, 20 Wis. 54, gave a construction to the interest law theretofore in force, and at the time of the issuing of these bonds in force in that state. By that decision these coupons drew interest, at the legal rate of 7 per cent., from the time due; not because coupons for the interest were given, but on the ground that, the interest being due and not paid, it draws interest, like any other debt that is overdue, when no interest is expressly stipulated. This decision was made in 1865.

It may be that the weight of authority upon this question generally is the other way. Certain it is that the authorities are divided. But such was the law of this state when these bonds were made, and until chapter 60, Sess. Laws 1868, was enacted. It is claimed that this statute has changed the rule even as to contracts existing at the time of its passage. Section 1 is as follows:

"It was and is the true intent and meaning of sections 1 and 2 of chapter 160 of the General Laws passed in the year 1859, and of all other laws heretofore enacted in this state prescribing and limiting the rate of interest, that interest should not be compounded or bear interest upon interest unless an agreement to that effect was clearly expressed in writing and signed by the party to be charged therewith."

Section 2 is as follows: "Section 2 of chapter 160 of the General Laws of 1859 is hereby amended by adding thereto the following: And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded; nor shall the interest thereon be construed to bear interest."

By the Revised Statutes of 1878 the following provision takes the place of this statute:

"Section 1689. * * * * And in the computation of

interest upon any bond, note, or other instrument or agreement, interest shall not be compounded; nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith."

It should not be inferred that it was intended either of these statutes should apply to contracts already made, unless such a construction be unavoidable. The legislature may enact new laws or amend old ones for the government of the people in the future, but it cannot put a construction upon laws already existing, and give to such construction a retroactive effect, so as to overturn a settled interpretation given by the court. And to undertake it is to simply confound the legislative with the judicial function. *Cooley's Constitutional Limitations*, 93-6; *Reiser v. William Tell*, 39 Pa. St. 137; *People v. Bd. Sup'rs of New York*, 16 N. Y. 431; *Salters v. Tobias*, 3 Paige, 338.

But suppose the first section of chapter 60 be taken as evidence of an intent on the part of the legislature to make the prohibition against reckoning interest upon interest apply to past contracts, the question arises, does the law impair the obligation of the contract, or does it merely affect the question of the measure of damages which is part of the remedy?

A judgment rendered in New York, which by the law there draws 7 per cent., if sued over in Massachusetts, where the rate is 6 per cent., only 6 per cent. will be allowed as damages. *Barringer v. King*, 5 Gray, 9.

So, if a note given in New York drawing 7 per cent. before and after due is sued in Massachusetts, 7 per cent. will be allowed up to the time the note falls due as interest, according to the law of the place where the contract is made, and 6 per cent. after due as the measure of damages in Massachusetts. So in other states interest is recovered upon a contract after due, not as interest by force of the contract, but as damages. But, whatever the rule may be elsewhere, it has always been in Wisconsin that interest is recoverable upon a contract providing for interest until due at the same

rate after as before due, upon the ground of an implied contract, and that such is the implied agreement and understanding of the parties. See *Spencer v. Maxfield*, 16 Wis. 178.

If interest after due is recoverable on the ground of an implied contract, then such implied contract comes as surely within the protection of the constitutional provision as though the contract were express. During the first 11 years of the life of these bonds, to-wit, from 1857 to 1868, the undoubted law of the state was that interest should be recovered upon the coupons overdue, so that if this suit could have been brought in 1868, before the passage of this statute, the plaintiff must have recovered according to that law. Now, suppose we say that the statute affects the remedy merely, does it not affect it in so substantial a manner as to be equivalent to an impairment of the contract?

I think it must be conceded that it cuts off a material portion of his cause of action, as it makes a difference of between one and two thousand dollars whether interest be reckoned according to the law in force when the contract was made, or that in force when the trial is had. The distinction between impairing the obligation of the contract and changing the remedy is very misleading, unless its operation be confined where it belongs, within very narrow limits. I take it that any change in the remedy which practically cuts off a portion of the cause of action, or renders the contract of less available worth, is as much within the constitutional prohibition as a law which strikes directly at the contract itself. Otherwise it would always be in the power of a state legislature to practically nullify this great constitutional guaranty.

The remedy existing at the time the contract is made, as entering into the contemplation of the parties at that time, is part of the obligation of the contract, and it should be no more in the power of the legislature to impair that in such a way as to render the contract of less value, than it is to impair the contract itself. See *Edwards v. Kearszey*, 96 U. S. 593.

But I think the statute, if made to apply to past contracts, clearly impairs the obligation of the contract itself. But, as

I said, a construction making these statutes apply to contracts made before their passage should not be adopted unless necessary, and whatever may be said of chapter 60, Laws of 1868, it is no longer in force, having been repealed by the Revised Statutes of 1878, which substitutes the other provision above referred to in its place; and as to the last provision, which is now in force, though the language is general enough to apply to all contracts, if such a construction would not render the law unconstitutional, it should, I think, in view of this consideration, if no other, be held to apply only to contracts executed after its passage; and such I hold to be the proper construction.

The plaintiff will be entitled to judgment for the principal of the two bonds, and the amount named in the unpaid coupons thereto attached, with interest at 8 per cent. upon the principal from January 1, 1877, the time the bonds fell due, and with interest at 7 per cent. upon the unpaid coupons from the time they severally fell due.

WADSWORTH v. ST. CROIX COUNTY.

'Circuit Court, W. D. Wisconsin. ———, 1880.)

1. MUNICIPAL BONDS—BOARD OF SUPERVISORS.—An act of the legislature of the state of Wisconsin provided that the board of supervisors of the defendant county "shall have power, by resolution, to cause to be issued bonds * * * * * to an amount not exceeding fifty thousand dollars," "if a majority of the ballots cast" by the legal voters in said county "be 'for railroad aid.'" *Held*, where a majority of the ballots cast were "for railroad aid," that it still rested in the discretion of the board of supervisors whether such bonds should be issued.

Aspenwall v. Com'rs of the County of Daviess, 22 How. 364.
Town of Concord v. Savings Bank, 92 U. S. 625.

Demurrer to Complaint.

BUNN, D. J. This case stands upon a general demurrer to the complainant's bill. The suit is in equity, to compel the specific performance of an alleged contract on the part of the

county to issue bonds to aid in the construction of the Tomah & St. Croix, now the West Wisconsin, Railway. The acts and parts of acts under which the question arises are as follows:

GENERAL LAWS OF WISCONSIN—1864—PAGE 368.

Chapter 307.

[Published April 20, 1864.]

An act to authorize certain counties therein named to aid in the construction of a railroad from Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. At the annual town meeting for the election of town officers, to be held in and for the different towns comprising the counties of St. Croix, Dunn, Chippewa, Pierce, Eau Claire, Buffalo, Clark, Trempealeau, Jackson, Pepin, and Monroe, in the year one thousand eight hundred and sixty-four, or at any subsequent annual town meeting or general election held in each and any of said towns comprised in any one of said counties, the legal voters of said counties, or either of them, may deposit ballots, written or printed, in words as follows: "For railroad aid," or "against railroad aid." Such ballots shall be deposited in a separate box provided for that purpose by the inspectors of election, and such ballots shall be considered as the votes of the legal voters upon such question, and shall be counted, canvassed, and returned to the proper officers as in other elections, and as provided under the election laws of the state applicable thereto: *provided*, ten days' notice of such submission shall be given by the sheriff of said counties, respectively, by posting in each town in the county, in four public places, a written or printed notice stating that a submission of the question of railroad aid will be had.

Sec. 2. If a majority of the ballots cast in any of said counties be "for railroad aid," the county board of supervisors of said county shall have power, by resolution, to cause

to be issued bonds of a denomination of one hundred dollars to one thousand dollars each, to an amount not exceeding fifty thousand dollars for each of said counties, payable thirty years after the date thereof, with interest at the rate of seven per centum, payable semi-annually in the city of New York, at such place as the treasurer of the state shall designate.

* * * * *

Sec. 8. If, from any cause, the said question is not submitted to the electors of either of said counties at the annual town meeting, on the first Tuesday of April, one thousand eight hundred and sixty-four, it shall be submitted at any election or town meeting thereafter, when any ten electors of said county shall file with the clerk of the county board of supervisors a petition therefor; and, when such petition is thus filed, the said clerk shall give notice of the proposed submission of such question in the same manner as notices of general elections are now required by law to be given by the sheriff.

Sec. 9. This act shall take effect and be in force from and after its passage and publication.

Approved April 1, 1864.

GENERAL LAWS OF WISCONSIN—1865—PAGE 380.

Chapter 279.

[Published May 20, 1865.]

An act to legalize the proceedings of certain town meetings held in the several towns of St. Croix county.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. The special town meetings held in the several towns of St. Croix county, on the twenty-second of June, 1864, and the canvass of the votes given thereat, under the acts passed above, entitled for the purpose of aiding in the construction of the Tomah & Lake St. Croix Railroad, and of the St. Croix & Lake Superior Railroad, are hereby declared to be legal and valid in all respects, as if the said laws in

relation to said elections and canvass of votes had been fully and in all respects complied with.

Sec. 2. The said board of supervisors of St. Croix county are hereby authorized and empowered to issue bonds to the amount of twenty-five thousand dollars to each of said railroad companies, in pursuance of said acts, for the purpose of aiding in the construction and completion of the same, in the same manner and with the like effect as if the said town meetings had been legally held, and the votes properly canvassed under said acts.

Sec. 3. This act shall take effect and be in force from and after its passage and publication.

Approved April 1, 1865.

PRIVATE AND LOCAL LAWS—1872.

Chapter 116.

[Published April 5, 1872.]

An act to repeal a portion of chapter 307 of the General Laws of 1864, entitled "An act to authorize counties therein named to aid in the construction of a railroad, from Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company."

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. So much of chapter 307 of the General Laws of 1864, entitled "An act to authorize certain counties therein named to aid in the construction of a railroad, from Tomah to Lake St. Croix, by the Tomah & Lake St. Croix Railroad Company," as authorizes the issue by the county of St. Croix and the county of Eau Claire of any bonds in aid of the construction of said railroad, is hereby repealed.

Sec. 2. All acts or parts of acts conflicting with the provisions of this act are hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved May 25, 1872.

Under chapter 307, Laws 1864, in the month of June, 1864, a petition was made and presented for a special election to be held in the several towns of St. Croix county, to vote on the proposition for railroad aid to the amount of \$25,000. A meeting was held, pursuant to call, and a vote taken, which resulted in a majority vote in favor of such aid. Afterwards, there being some supposed irregularity in the holding of the meeting and canvassing the votes, chapter 279, Laws 1865, was passed. The supervisors never issued the bonds as they were empowered to do by the second section of the act of 1864; and the question is whether the transaction of the vote, in connection with the several statutes, and the fact that the road has been built, constitute a contract which the plaintiff has the right to have specifically performed.

I think the proper construction of section 2 of the act of 1864 is that it vests a discretion in the board of supervisors, after a favorable vote has been had, to cause to be issued bonds to an amount not exceeding \$50,000. If the statute had authorized the people to vote the amount, and then provided the board might issue the bonds for the amount so voted, perhaps it would be the duty of the board to issue the bonds, though the law were permissive. But, under this statute, the people were only authorized to vote on the question of aid either "for or against." They were not authorized to vote any particular amount. If they voted for railroad aid, then the board of supervisors were empowered to determine the amount, not exceeding \$50,000, and cause the bonds to be issued.

It seems clear that the action of the board, in fixing the amount by resolution and authorizing the issue of the bonds, is an essential part of the machinery by which the aid can be given; that the law vests a discretionary power, and that until the supervisors make their resolution there is no contract. The supervisors, and not the people, are the usual contracting power of the county, and it is not to be presumed that the legislature intended to take this power from the board, unless such intention is clearly expressed.

In this case the vote of the people, under the law, conferred the power on the board to make the contract, but did not constitute the contract itself. That power was still left with the board. It is claimed by complainant's counsel, in his argument upon the demurrer, (see page 11, printed brief,) that it was held by this court, in *Wadsworth v. County of Eau Claire*, that the complaint, which set up substantially the same facts as this, presented a proper case for equitable relief. I do not so understand the decision of the court. Indeed, the court had no occasion to decide that question. That was an action at law to recover damages by this same plaintiff against the county of Eau Claire, which had voted aid under the same statute, and the supervisors had refused to issue the bonds. A demurrer was interposed, and the case argued at the June term, 1876, before Judges Davis and Hopkins, and the demurrer sustained. There was no opinion filed, and the record does not disclose the ground of the decision. But it would appear, from the briefs of counsel, that the case was mainly argued and submitted upon the question as to whether or not the vote of the people to extend aid constituted a contract, in connection with the statute, in the absence of any resolution of the board authorizing the issue of the bonds. In sustaining the demurrer, the court necessarily decided that the complaint did not set up a cause of action. How the court might have held if the complaint prayed for equitable relief we can best judge from what was held afterwards, when the same case came before the court in that form. If there was a contract with the railroad company to issue the bonds, and a breach of that contract, as there assuredly was, if any such contract existed, by a failure to issue them, so that an action would lie to enforce a specific performance, it is difficult to see why an action at law will not lie for damages. After the demurrer in the action at law was sustained, the case was discontinued, and an action like this commenced, in December, 1876, on the chancery side, to compel a specific performance of the contract. The same plea was put in as here. The case was argued before his honor Judge Drummond, at the La Crosse term, in Sep-

tember, 1877, and the demurrer again sustained. An appeal from the decision was taken in the spring of 1878, to the supreme court, and the case is now pending in that court; so that, unless the statute of April 1, 1865, legalizing the proceedings of the several town meetings in St. Clair county, changes the aspect of this case, the question will appear to be *res adjudicata* in this court; and such I believe to be the fact, as I cannot see that the last-named statute helps the plaintiff's case.

It seems clear from the title of the statute, as well as from the provisions of sections 1 and 2, that the purpose is not to levy a tax upon the county or to make a contract for the county, but to simply cure the supposed defects and irregularities in the holding of the several town meetings, under the law, and in the canvassing of the votes thereat, so as to put the supervisors in the same condition of authority, in regard to the issuing of bonds to the extent of \$25,000, that they would have been in if the said town meeting had been legally held and the votes properly canvassed. To give the act a larger meaning would be doing violence to the language of the title as well as that of the body of the act itself.

I think the case of *Aspenwall et al. v. Com'rs of the County of Daviess*, 22 How. 364, is an authority in point on the main question raised by this demurrer. In one important respect that case was a stronger one for the plaintiff than this. The bonds had been actually issued and sold by the company to parties who had no notice of their invalidity. It is stronger in another respect, that the law in that case made it the *duty* of the board of commissioners to subscribe for the stock, if a majority of the qualified voters determined in favor of the subscription. And yet the court in that case, on page 378, say: "It is insisted that the contract of subscription became complete when, at the election, a majority of the votes was cast in its favor, and did not require the form of a subscription on the books for the stock of the railroad company to make it obligatory upon the parties. * * * But the court is unable to concur in this view. It holds that a subscription was necessary to create a contract binding upon the county, on one side, to

take and pay the bonds; and upon the other, to transfer the stock and receive the bonds for the same. Until the subscription is made the contract is unexecuted, and obligatory upon neither party."

See, also, *Town of Concord v. Savings Bank*, 92 U. S. 625.
Demurrer sustained.

SHUMWAY and others v. CHICAGO & IOWA R. Co. and others.

(*Circuit Court, N. D. Illinois.* —, 1880.)

1. REMOVAL—WANT OF CONTROVERSY.—In a controversy between a railroad and its stockholders, as to the validity of certain shares of the railroad stock, the cause cannot be removed to the federal court upon the application of the holder of such stock, where there is no controversy as to its ownership.

DRUMMOND, C. J. This was a bill filed in the state court by several stockholders of the railroad company for the purpose of obtaining a decree of the court declaring that certain shares of stock, issued by the president of the railroad company to the Chicago, Burlington & Quincy Railroad Company, were invalid. There was an answer put in by the defendants, and, after various steps taken in the state court, Charles E. Perkins, one of the officers of the Chicago, Burlington & Quincy Railroad Company, and a citizen of Iowa, made application to have the cause removed to this court. The usual petition and bond were filed, and the record is brought to the court and leave asked by the defendants to have the transcript of the record from the state court filed, and the cause entered upon the calendar, on the ground that it has been properly removed from the state court to this court. To this objection is made by the plaintiffs, they insisting that the cause is not of such a character as it can be properly transferred to this court.

The controversy is as to the validity of 6,640 shares of stock of the Chicago & Iowa Railroad Company. There seems to be no controversy as to the ownership of this stock, if valid,
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being in the Chicago, Burlington & Quincy Railroad Company. Admitting that there may be a question as to the part which each of the individual defendants may have taken in any act affecting the validity of the stock, still I do not well see how, under the facts of the case, and considering the questions involved in it, there can be said to be a controversy which is wholly between Mr. Perkins, who asks for the removal of the cause, and the plaintiffs. If it were admitted that he took a more active part in any transaction which would tend to render, or which would actually render, the stock invalid, it is difficult to understand how that makes it a controversy wholly between him and the plaintiffs, or between the plaintiffs and any one of the individual defendants. And if it were conceded also that one of the individual defendants was the owner of a portion of the stock, and its invalidity was to be determined or ascertained from transactions in which the defendants participated jointly, I cannot see that it should be regarded as creating such a controversy; but, as has already been stated, in view of the admitted ownership of the shares of the stock, there cannot be said to be any controversy existing in the case, which is wholly between Mr. Perkins and the plaintiffs, and therefore the application which is made to have the transcript of the record filed, and the cause entered on the calendar, is overruled.

SMITH v. TOWN OF ONTARIO.

(Circuit Court, N. D. New York. November 9, 1880.)

1. **FORMER ADJUDICATION—ESTOPPEL.**—A former adjudication is an estoppel only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered.
Cromwell v. County of Sac, 94 U. S. 351.
2. **SAME—"MATTER IN ISSUE"—DEFINITION.**—The matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated.
3. **SAME—MATTER OF EVIDENCE.**—Whatever is merely matter of evidence becomes of no importance after the determination of the matter in issue.

4. **SAME—AGENCY.**—Therefore, an adjudication that certain bonds were originally issued by the agents of the defendant without authority, will preclude the plaintiff from showing in another action a ratification by the defendant of the acts of his agents.

Motion for a New Trial.

C. T. Richardson and *Albertus Perry*, for complainant.

W. F. Cogswell, for defendant.

WALLACE, D. J. This motion for a new trial involves the single question whether or not the judgment in the former action between the parties concludes the plaintiff upon the issues in the present suit.

The former action was brought to recover instalments of interest on certain bonds of the defendant falling due April 1, 1875. The present action is to recover instalments of interest on the same bonds falling due April 1, 1876. In the first action a verdict for the defendant was directed by the court and judgment was entered accordingly. The defendant now insists upon that judgment as conclusively establishing the defence that the bonds are invalid.

The complaint in the first action alleged, in substance, that the bonds were executed and issued by agents of the defendant, in compliance with authority conferred upon the agents by statute. The answer controverts these allegations. Upon the trial the defendant moved the court to direct a verdict for the defendant, upon the ground that the agents had issued the bonds without compliance with the statute in several specified particulars. The court ruled with the defendant, and ordered a verdict accordingly. In the present action the same issue is presented by the pleadings, but upon the trial the plaintiff proved that, after the bonds had been issued, the defendant ratified the acts of the agents in executing and issuing the bonds. In the former action some evidence was given which tended to prove a ratification, but the point whether there had been such ratification or not was not decided or considered. The precise question now is whether the plaintiff is precluded, by the former adjudication, from showing that, although the bonds were originally issued

by the agents of the defendant without authority, their acts were afterwards ratified by their principal.

In a recent case, of controlling authority, (*Cromwell v. County of Sac*, 94 U. S. 351,) the rules which furnish the test whether or not a former adjudication is an estoppel, have been defined so explicitly as to remove the uncertainty which has existed in a class of cases as to which there have been many conflicting expressions. The general rule, that the judgment of a court of concurrent jurisdiction is as a plea, a bar, or as evidence conclusive between the same parties upon the same matter, directly in question in another court, has been repeated in all the adjudications since it was enunciated by Lord Chief Justice De Grey in the *Duchess of Kingston's Case*; but many authorities are found which declare that the estoppel applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but also to every point which belonged to the subject of the issue, and which the parties might have brought forward at the time. Perhaps no more striking illustration of the extent to which this doctrine has been carried can be found, than in the decisions of the court of appeals of this state, where it is held that a recovery by a surgeon for professional services is conclusive in his favor when subsequently sued for malpractice in performing such services, although the point whether the services were properly performed was not presented or contested in the former suit. *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150. It is unnecessary to refer to cases like *Davis v. Hedges*, Law Rep. 6 Q. B. 687, and *Mondel v. Steele*, 8 Mees & W. 858, which are directly to the contrary effect; but there are expressions of opinion in cases in the supreme court prior to *Cromwell v. County of Sac*, which indicate that the estoppel extends not only to the matters of fact and law which were decided in the former action, but also to the grounds of recovery or defence which might have been but were not presented. *Beloit v. Morgan*, 7 Wall. 619; *Aurora v. West*, 7 Wall. 106.

In *Cromwell v. County of Sac*, however, the conclusiveness

of the estoppel as to all matters which might have been litigated, but were not in fact, is confined to cases where the second action is brought upon the same claim or cause of action as that on which the first was brought; and it is held that, when the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted in the former action, upon the determination of which the finding or verdict was rendered. Accordingly, it was decided that where the plaintiff had been defeated in an action upon coupons of county bonds, upon the ground that the bonds were void against the county because they had been fraudulently issued by the county judge, that judgment did not conclude the plaintiff in a subsequent action against the county, brought upon subsequently maturing coupons of the same bonds, in which it was made to appear that the plaintiff was an innocent purchaser of the coupons for value and before maturity. The decision proceeds upon the ground that the question whether the bonds were void as against an innocent holder, for value and before maturity, was not litigated or determined in the former suit, and was therefore open to be litigated in the second action.

Accepting *Cromwell v. County of Sac* as decisive of the doctrine that the former adjudication is an estoppel only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered, it remains to apply that doctrine to the present case. Concededly, it was not decided that the acts of the agents in issuing the bonds did not bind the defendant, notwithstanding the defendant ratified the transaction, because the effect of the ratification was not considered. But it was decided, upon all the evidence in the case, that the acts of the agents were not binding upon the defendant. Now, what was the matter in issue or point in controversy in that action, within the meaning of the rules of estoppel? *Cromwell v. County of Sac* is an authority that in an action where there was no issue as to the right of a *bona fide* purchaser to recover upon bonds, that

question was not concluded in a subsequent action by the adjudication in the former action. But that case does not decide that a former adjudication will not be conclusive upon a given question unless the decision turned upon precisely the same evidence as that which is introduced in the subsequent action. The doctrine of estoppel becomes of very little practical value if, whenever a former adjudication is relied on, the former can be distinguished from the second by some variations in the evidence. The matter in issue or point in controversy may involve a number of minor issues, and it cannot be said not to have been decided because some of these minor issues were not specifically considered.

The matter in issue has been defined in a case of leading authority as "that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleading." *King v. Chase*, 15 N. H. 9. The issues presented by the pleadings may be modified by the proceedings upon the trial, as where a defence is withdrawn from consideration, or where a count in the declaration is abandoned. However this may be, the matter in issue or the point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated. If, in an action upon a note, the defendant denies the execution of the note, and a verdict is found for the plaintiff, the fact that the defendant executed the note is established finally for the purpose of all subsequent litigation between the parties. It may be that this conclusion was reached upon the consideration of various subordinate facts which do not appear in the subsequent action, or which stand altered by the case newly presented, yet the matter in issue is concluded by the former adjudication. So, in an action against a principal upon a contract made by an agent, where the defendant denies the agency and the judgment is for the defendant, the fact that there was no agency is forever established for the purposes of future actions between the parties. It may be that the fact of an agency was attempted to be proved, on the trial of the former action, by showing that the defendant had held out the per-

son as his agent, but the conclusiveness of the adjudication could not be overthrown in a subsequent action by proof of a written authority which was not given upon the trial of the former action.

In short, whatever is merely matter of evidence becomes of no importance after the determination of the matter in issue. If these views are correct it is not difficult to determine what was the matter in issue or point in controversy in the present case. The issue was whether or not the acts of the agents in issuing the bonds were, in fact and in law, the acts of the defendant. It was determined that they were not. The point in controversy was not how or whereby the acts of the agents became the acts of the principal, but whether they were so. The plaintiff sought to establish the issue in his favor by showing a statutory authority in the agents. Instead of doing this, the plaintiff might have shown that the defendant had adopted the acts done in his behalf. A subsequent ratification is equivalent to an original authorization. Either mode of proving the agency was permissible under the pleadings, and the allegations of the pleadings in that behalf are the same in the present action as in the former one. The ultimate fact to be proved was the agency; the manner of proving it was merely a matter of evidence. The plaintiff can no more be permitted to re-open the matter in issue thus settled, by the new evidence which he offered here, than he could be by giving in evidence new or additional facts showing compliance with the statutory requirements.

Unless these conclusions express the correct view of the effect of a former adjudication, it would be wiser to abrogate all the rules which comprise the law of estoppel relating to the conclusiveness of former judgments. They are intended to give permanence to established rights by refusing to re-open controversies which have once been tried, and in which the parties have had full opportunity to bring forward their proofs and present the merits of their case. If a controversy once tried and determined is to have no effect whenever different evidence upon the same matter in issue can be produced, the

only practical result would be to add to the ordinary complications of a trial those which would arise by retrying at the same time a former controversy also.

The motion for a new trial is denied.

TEMPLE and others v. SMITH and others.

(Circuit Court, D., Nebraska. November 11, 1880.)

1. REMOVAL—ASSIGNMENT OF CLAIMS.—A defendant cannot acquire the right to have his cause removed to the federal courts by the purchase of the interests of his co-defendants.*
2. SAME—CONTROVERSY—SEVERAL CREDITORS—CONTEMPORANEOUS ATTACHMENTS.—Five several attachments were sued out on five distinct claims, and were all levied at the same time upon a certain stock of goods. *Held*, that the controversy as to the ownership of the stock of goods was a single controversy between the plaintiffs on one side, and all the attachment creditors upon the other side.

Motion to Remand.

——, for plaintiffs.

——, for defendants.

MCCRARY, C. J. We have considered the motion to remand. This was a suit brought in the state court—a replevin against the sheriff of Saline county to recover possession of a stock of goods which the sheriff held under five several writs of attachment. The sheriff appeared in the state court, and moved to substitute the judgment creditors as the real parties in interest, and that motion was sustained. Two of these judgment creditors are citizens of this state, one of them is a citizen of Iowa. After the substitution of the judgment creditors as defendants, the Iowa firm appeared in the state court and moved to be substituted as sole defendant, alleging that they had become the purchasers of the claims. There is nothing in the record to show that motion was acted upon by the state court, but immediately upon its being filed the non-

*See *Hoyt v. Wright*, 4 FED. REP. 168.

resident defendants of Iowa filed a petition to remove the cause to this court, alleging that they had been purchasers and assignees of the other defendants. The motion is now made to remand by the plaintiffs.

I have already decided that an assignee who could not originally sue in this court cannot remove the cause from the state court. That disposes of this case, except so far as the claims of the Iowa parties, which they held originally, are concerned. They owned one of the five claims upon which this attachment was sued out, independently,—a claim which was in controversy in this case. It is now insisted, under the second section, that, if the whole case cannot be removed, so much as related to the claim of these non-resident parties may be removed. The original controversy here is between the Iowa attaching creditors and these plaintiffs, but it is not wholly between them. The controversy is as to the ownership of this stock of goods, and that is a controversy between the plaintiffs on one side, and all the attachment creditors on the other side. It cannot be said to be a controversy between the plaintiffs and any one of the creditors. It follows that, if this cause should be removed, there might be conflicting judgments upon this same subject.

There is another difficulty. The attachments were all levied at the same time, and they are to be paid out of the proceeds of the property. How can this court confer with, or act with, any court in making any *pro rata* disposition of this fund? I do not see how it would be possible to get along in that way. Even if both courts should sustain the attachment, we could not be inquiring what the state court had done.

I do not think the controversy is one which can be fully determined between the Iowa parties and other claimants, and the motion to remand is sustained.

BRAND v. UNITED STATES.

(Circuit Court, N. D. New York. November 6, 1880.)

1. SENDING LETTERS THROUGH MAIL—INTENT TO DEFAUD—REV. ST. § 5480.—Section 5480 of the Revised Statutes provides that "if any person having devised, or intending to devise, any scheme or artifice to defraud or be effected by either opening, or intending to open, correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so desiring or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the post-office establishment shall be punishable by a fine of not more than \$500, and by imprisonment for not more than 18 months or by both such punishments." *Held*, that the word "or," in the expression "or be effected," is a clerical mistake for the word "to," and that the expression should be, "to be effected."
2. CIRCUIT COURT—WRIT OF ERROR—ACT OF MARCH 3, 1879, (20 U. S. ST. AT LARGE, 354.)—The only questions that can be reviewed in the circuit court upon a writ of error, under the act of March 3, 1879, (20 U. S. St. at Large, 354,) relating to "criminal cases tried before the district court," are those which appear by the record to have been decided and duly excepted to in the court below.
3. REQUEST—INDICTMENT—SUFFICIENCY.—A request to instruct the jury that there was no evidence in the case upon which there could be a legal conviction under the indictment, does not raise any question as to the sufficiency of such indictment.
4. SAME—EVIDENCE—SUFFICIENCY.—The circuit court cannot, on writ of error, pass upon the sufficiency of the evidence in the court below, where the bill of exceptions does not clearly set forth all such evidence.
5. SENDING LETTERS THROUGH MAIL—INTENT TO DEFRAUD—EVIDENCE.—The fact that defendant received letters in answer to an advertisement, and the fact that the letter inclosing the advertisement to the newspaper in which it was published was in the defendant's handwriting, warranted the court in charging, under the circumstances of this case, that such facts were evidence that defendant mailed such letter and advertisement.

United States v. Noelke, 1 FED. REP. 426-442.

Writ of Error under the Act of March 3, 1879.

Matthew Hale, for plaintiff.*Martin I. Townsend*, Dist. Att'y, for the United States.

BLATCHFORD, C. J. The plaintiff in error, Brand, was indicted in the district court under section 5480 of the Revised Statutes. That section provides as follows: "If any person having devised, or intending to devise, any scheme or artifice to defraud or be effected by either opening, or intending to open, correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so desiring or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person so misusing the post-office establishment, shall be punishable by a fine of not more than \$500, and by imprisonment for not more than 18 months, or by both such punishments." It is plain that the word "or," in the expression "or be effected," is a clerical mistake for the word "to." The expression should be, "to be effected." As it is it is meaningless, and with it the whole provision is incomplete. If the reading be, "to be effected," the provision is complete and harmonious. The scheme to defraud is to be effected by the deviser of it opening a correspondence by mail, or by his inciting some one else to open such correspondence with him. The mistake exists in the original statute, section 301 of the act of June 8, 1872, (17 U. S. St. at Large, 323.)

The indictment contains two counts. The first count alleges that Brand, "at Plattsburgh aforesaid, in the district aforesaid, on the sixth day of August, A. D. 1878, knowingly, wrongfully, and unlawfully devised a certain scheme and artifice to defraud, to be then and there effected by opening, and intending to open, correspondence and communication with divers other persons to the jurors aforesaid unknown, by means of the post-office establishment of the United States, to-wit, the said Anselm P. Brand did then and there knowingly, wrongfully, and unlawfully devise a certain scheme and artifice to defraud divers persons, to the jurors aforesaid unknown, of divers sums of money, to the jurors aforesaid

unknown, which said scheme and artifice was by the said Anselm P. Brand intended to be effected by sending, by means of the post-office establishment of the United States, to the editors and publishers of the *Malone Palladium*, a weekly paper published in Malone, Franklin county, New York, and within the northern district of New York, and within the jurisdiction of this court, to-wit, one Frederick J. Seaver and one Oscar P. Ames, who were, at the time last aforesaid, the editors and publishers of the said *Malone Palladium*, the following special notice and letter, to-wit:

“SPECIAL NOTICE.—*Wanted*: A few good young men (those from the country preferred) to go on the road as traveling salesmen, to sell a specialty to the grocery trade. If we can get the right ones, will pay them good wages. Examine samples of our specialty. We want plain, temperate, ambitious young men, who will not abuse our confidence, and who are not afraid to carry a 44-pound sample case and make 60-day trips, when circumstances require it, without grumbling. We want you to travel by public conveyance. Enclose 25 cents with your application, and we will forward you a sample, express paid, and we will say here that we will pay no attention to applicants who do not feel interest enough to examine sample first, and be your own judge as to your fitness for the work; others need not apply. Address A. B. Fritz & Co., care Cumberland House, Plattsburgh, New York. August 6, 1878.’

“PLATTSBURGH, August 6, 1878.

“DEAR SIR: Enclosed please find two dollars, as part payment for publishing the within notice for two months. We shall be in your place September 1st or 2d, and will call and see you and settle same. Please send us a paper, with above notice, to this place, care of Cumberland House, and oblige
A. B. FRITZ & Co.’

“And he, the said Anselm P. Brand, did then and there knowingly, wrongfully, and unlawfully send said special notice, by means of the post-office establishment of the United States, to the said Frederick J. Seaver and Oscar P. Ames, editors and publishers as aforesaid, by depositing in the post-office

of the United States, at Plattsburgh aforesaid, said special notice and letter, he, the said Anselm P. Brand, then and there intending to cause said special notice to be published in said *Malone Palladium*, and circulated through the mails of the United States by means of the post-office establishment of the United States, which said special notice was then and there a scheme and artifice to defraud divers and sundry persons, to the jurors aforesaid unknown; and which said special notice was, at Malone aforesaid, by the said Anselm P. Brand, thereafter, to-wit, on the fifteenth day of August, A. D. 1878, knowingly, wrongfully, and unlawfully caused to be deposited in the post-office of the United States, to-wit, in the post-office at Malone aforesaid, he, the said Anselm P. Brand, then and there intending thereby to open communication, by means of the post-office establishment of the United States, with divers persons to the jurors aforesaid unknown, he, the said Anselm P. Brand, then and there, by such means, knowingly, wrongfully, and unlawfully contriving and intending to defraud said persons, contrary," etc.

The second count alleges that Brand, "on the fifteenth day of August, A. D. 1878, at Malone, in the county of Franklin, and state of New York, and northern district of New York, and within the jurisdiction of this court, knowingly, wrongfully, and unlawfully did cause to be deposited in the post-office of the United States, to-wit, in the post-office at Malone, aforesaid, a certain 'special notice' in the words and figures following, to-wit, [as in the first count,] which said special notice was then and there, by the said Anselm P. Brand, caused to be signed at the end thereof as follows, 'A. B. Fritz & Co.,' and which said special notice was then and there, by the said Anselm P. Brand, caused to be addressed to divers persons, to the jurors aforesaid unknown, intending thereby to open communication with said persons, and intending thereby to incite said persons to open communication with him, the said Anselm P. Brand, he, the said Anselm P. Brand, then and there, by such means, knowingly, wrongfully, and unlawfully contriving and intending to defraud said persons, contrary," etc.

This case is before the court on a writ of error, allowed under the provisions of the act of March 3, 1879, (20 U. S. St. at Large, 354.)

The record states that, on a trial on a plea of not guilty of the offences charged in the indictment, the defendant was found guilty of the offences charged in said indictment, and was sentenced for said offences to be imprisoned in the Albany county penitentiary for the term of one year, and to pay a fine of \$250. The return to the writ, in addition to the record of judgment and the minutes of the trial, contains a bill of exceptions taken by the defendant. There is no assignment of errors, nor any statement of any exceptions except such exceptions as are found in the bill of exceptions. There is no statement of any objection having been taken in the court below to the indictment, by demurrer or otherwise, either as to form or substance, or of any motion to quash it, or of any motion there in arrest of judgment. There is not, in the bill of exceptions, any statement of any question having been raised as to the indictment. Nevertheless, the defendant on this writ of error raises the question as to the sufficiency of the indictment. He contends that the indictment charges no criminal act; that it is not enough to allege an intent to defraud; that no facts are stated, which, if proved, will support the conclusion averred, that the deposit of the notice in the post-office was in pursuance of a scheme to defraud; that the notice and the letter are harmless and innocent if issued in good faith; that it is not averred that the notice was not signed by A. B. Fritz & Co., or that A. B. Fritz & Co. were not ready or did not intend to forward the samples as provided in the notice, or that the specialty to be sold to the grocery trade did not exist, or had no value, or that the persons who may have sent their money to the address indicated did not receive the samples promised, or were in any way defrauded, and that averments should be found in the indictment from which the court can see how the fraud was to be accomplished.

The act of March 3, 1879, provides that the circuit court shall have jurisdiction of writs of error "in certain specified

criminal cases tried before the district court;" that "in such case a respondent, feeling himself aggrieved by a decision of a district court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case;" that the respondent "may petition for a writ of error from the judgment of the district court, * * * which petition shall be presented to the circuit judge, * * * who, on consideration of the importance and difficulty of the questions prescribed in the record, may allow such writ of error."

The purport of these provisions is that it is only the decisions of the district court which are excepted to in that court that can be reviewed under the writ of error. The questions to be considered on allowing the writ are only the questions decided by the court below, and which appear by the record to have been decided, and where, also, the decisions were excepted to below. In this case, the petition for the writ, which is part of the case, sets forth that, on the trial, "your petitioner, by his counsel, excepted to many of the rulings of said court; that said rulings relate to the construction of said section of the Revised Statutes, and to the evidence requisite for a conviction under said section; that a bill of exceptions has been made on behalf of your petitioner, and has been settled and allowed," "and become part of the record of the case;" and "that your petitioner is advised by his counsel and believes that the questions arising on said exceptions and presented in the record are important, and that there is good ground for the belief that the rulings of said district court, or some of them, were erroneous, and will be so adjudged by the circuit court." On a writ of error allowed on such a petition, and solely on the questions raised by the bill of exceptions, it is not competent, under this statute, to review any other questions.

The bill of exceptions states that at the close of the evidence the defendant, by his counsel, requested the court to instruct the jury that there was no evidence in the case upon which the defendant could legally be convicted under the

indictment. The court refused to so instruct the jury, and the defendant excepted to such refusal. This request cannot be regarded as raising any point as to the sufficiency of the indictment. It only raises the point as to the sufficiency of the evidence to warrant a conviction on the indictment as it stood, assuming it to be good.

The defendant seeks to raise the point as to the propriety of such refusal. But this court cannot pass on that question, for the reason that the bill of exceptions cannot be regarded as setting forth all the evidence. It does not state that it sets forth all the evidence, nor does it state anything from which it can be inferred that it sets forth all the evidence. On the contrary, it appears clearly, from its face, that it does not set forth all the evidence.

The defendant requested the court to instruct the jury (1) "that there is no evidence in the case from which the jury can find that defendant placed the special notice and letter in question in any post-office of the United States, or caused it to be so placed." This request was refused, and the refusal was excepted to. For the reason before stated, this request cannot be passed on by this court. The bill of exceptions states that "no direct evidence was given that the defendant placed the paper in question in any post-office, or that he received the same from any post-office, except as herein above stated." Indirect evidence may have been given to the above effect, and was competent to be considered, and may have been sufficient, in connection with the direct evidence referred to, to warrant the finding mentioned. The implication from the statement is that it was given, and is not set forth. At all events, it does not appear that the bill of exceptions sets forth all the evidence on the point, and the court below, in ruling on the request, was passing on all the evidence,

The defendant requested the court to instruct the jury (2) "that the mailing of the *Malone Palladium* at Malone, by the publishers of that paper, did not constitute an offence under the laws of the United States for which defendant can be held liable on the evidence in this case." This request was refused, and the refusal was excepted to. This request was

intended to raise the point as to the sufficiency of the evidence to show that the defendant deposited, or caused to be deposited, in the post-office at Malone the newspapers containing the published notice. It does not appear that all the evidence is set forth, and the remarks before made apply to this branch of the case.

The defendant requested the court to instruct the jury (3) "that there is no evidence upon which the jury can find that the defendant received any letter or letters from any post-office of the United States, in violation of the laws of the United States, for which he is liable on this trial;" and (4) "that under the indictment in this case defendant cannot be convicted of receiving any letter from any post-office, in violation of the laws of the United States."

These requests were each of them refused and each request was excepted to. The bill of exceptions then states: "The court thereupon charged the jury, among other things, as follows: He read to them section 5480 of the Revised Statutes, and instructed the jury that the fact that some person had devised a scheme to defraud, to be effected through the agency of the post-office, had been established to such extent that they were authorized to find the case, as to that element, made out; that the important question was whether this defendant devised it and mailed the letter containing the advertisement to the publishers of the *Malone Palladium*, and received the answers to the advertisement, and unless they found against the defendant upon this question he could not be convicted; that, if he was the person who had done this, he was within the provisions of the statute; that it was not necessary that the letter should be personally mailed or personally received from the post-office by the defendant, in order to warrant a conviction; if he caused or procured the letter to be mailed, that was sufficient; that the defendant started with the presumption of innocence and was entitled to the benefit of any reasonable doubt; that he could not be convicted unless the evidence was such as was not only consistent with guilt, but inconsistent with innocence; that as to

the question, Who caused the letter which enclosed the advertisement to the *Malone Palladium* to be mailed? the fact that the letter was in defendant's handwriting, of itself, unexplained, was sufficient to authorize the conclusion that it was mailed by him; that it was proved that the defendant was at the Cumberland House every day, or nearly every day, except Sundays, from August 15th to August 26th, and it was also proved that letters addressed to A. B. Fritz & Co. disappeared mysteriously from the box to which he had access.

"The court also charged that the jury might consider on this question the false statement which the defendant had made with respect to the handwriting of the paper, that, if the testimony of Mrs. Sibley was true, then it was plain that he had the answers to this advertisement in his possession, and, if he received the answers, this fact was important as tending to show who mailed the advertisement and letter to the *Malone Palladium*; but that the jury, even if they disregarded the evidence of Mrs. Sibley as unworthy of credit, might find, from the other circumstances in the case, that a sufficient case had been made out to authorize the conviction of the defendant. The defendant, by his counsel, thereupon duly excepted to the charge of the court that it was not necessary that the letter should be personally mailed by the defendant, or that letters should be personally received by him from the post-office, in order to warrant his conviction. Defendant, by his counsel, also excepted to the charge of the judge that the fact that the letter to the *Malone Palladium* was in the handwriting of the defendant, of itself, unexplained, was sufficient to authorize the conclusion that it was mailed by the defendant; and thereupon the court modified that portion of its charge by saying that it was evidence from which the jury might infer that such letter was mailed by the defendant; to which modification the defendant, by his counsel, also duly excepted. Defendant, by his counsel, also excepted to that part of the charge of the court by which the jury were instructed that, even if they disregarded the evidence of Mrs. Sibley as unworthy of credit, they might find, from the other

circumstances in the case, that a sufficient case had been made out to authorize the defendant's conviction."

It is insisted by the defendant that it was error to refuse to charge in accordance with request 3, because the indictment does not charge the defendant with the offence of receiving a letter from a post-office, and because there was no evidence that he took or received a letter from a post-office, but evidence only at most which tended to show that he took from the delivery box of the Cumberland House letters answering the advertisement, which had come through the post-office and been put into such delivery box. It is also insisted by the defendant that it was error to refuse to charge in accordance with request 4, because, by such refusal, in connection with what was said in the charge in regard to receiving the answers to the advertisement, the jury were permitted to convict the defendant of an offence with which he was not charged in the indictment. In regard to request 3, the remark before made applies, that the whole evidence is not set forth in the bill of exceptions. Moreover, if the proposition in request 3 was true, it was not error not to charge it. It was irrelevant. The converse of the proposition was not asserted by the court. The jury were not charged that the defendant was on trial for receiving a letter from a post-office. There is nothing in the charge as set forth to that effect. The jury were instructed that the question was whether the defendant devised the scheme to defraud, and mailed the letter to the *Malone Palladium*, and received the answers to the advertisement; and that unless they found against the defendant on this question he could not be convicted. Evidence had been given to show that the defendant received the answers to the advertisement—not that he received them from the post-office, but that he had them in his possession, and had taken them from the box in the Cumberland House. No other evidence appears tending to show that he received them from a post-office. The part of the charge referred to was not excepted to by the defendant. It was too favorable to the defendant, if anything. The government might well have complained of it as requiring more, under the in-

dictment, to convict than proof of mailing. But, in connection with what was so charged in regard to receiving the answers to the advertisement, what was subsequently charged and not excepted to by the defendant must be taken into view,—namely, that if Mrs. Sibley testified truly the defendant had in his possession answers to the advertisement,—and that the fact of his receiving the answers (not taking them or receiving them from the post-office, but having them, from whatever source he received them) was an important fact, as tending to show who mailed the letter and the advertisement to the *Malone Palladium*.

This shows that what was previously said in the charge, as to receiving the answers to the advertisement, was, in view of the whole charge, said, and must have been understood by the defendant and by the jury as said, in the same sense; as what was afterwards said in regard to receiving the answers was clearly said—namely, as bearing solely on the question on trial—as to who mailed the letter and the advertisement to the newspaper. This is the true view, and under it the refusal to charge request 3 was no error. The same remarks apply to and dispose of the refusal to charge request 4. The exception to the charge as to personally mailing or personally receiving letters from the post-office does not appear to be insisted on, and is not tenable.

The court at first charged that the fact that the letter which enclosed the advertisement to the newspaper was in the handwriting of the defendant, of itself, unexplained, was sufficient to authorize the conclusion that it was mailed by him. On an exception being made by the defendant to such charge, the court modified it by saying "that it was evidence from which the jury might infer that such letters were mailed by the defendant." The meaning of this is that the charge as first given was, on the exception, modified so as to be as secondly stated, and as modified superseded and displaced the charge as first given, and that the first exception disappeared, and the only exception is to the charge as it stands when so modified. Such modified charge must be taken in connection with the whole charge.

The jury had been instructed that the fact had been established that some person had devised a scheme to defraud, to be effected through the agency of the post-office. This was not excepted to. The defendant had, as stated in the charge, made a false statement in respect to the handwriting of the letter and the advertisement. It appears that he had, on two occasions before he was indicted, denied that he wrote those papers. On the trial he testified himself that he did write them, and that he wrote them at the request of a person who had since died, by copying them from a paper which such person had handed to him, and that he did not deposit them, or cause them to be deposited, in any post-office, and had no knowledge as to what became of them after he handed them to such person, and that he had never had any of the answers to the advertisements. Other evidence was given on both sides in reference to the matters so testified to by the defendant. This throws light on the meaning of the word "unexplained" used in the charge, in connection with the portion so excepted to. The jury, to find the verdict they did, must have believed that the defendant's attempted explanation was untrue, and amounted to no explanation. If it was, the case under such circumstances, unexplained, stood in a worse position for the defendant than if he had not attempted an explanation. In addition, there was the false statement by the defendant as to the handwriting of the letter. Upon all this, and on all the charge, what the court said in the point in question, when modified, amounted to no more than this: that the fact that the letter was in the handwriting of the defendant was, in view of his previous denial and of his false explanation at the trial, evidence to be considered on the question of whether he mailed the letter, and evidence from which, in connection with other evidence in the case, the jury might infer that he mailed it.

The bill of exceptions expressly states that the court modified the charge, and that the charge, as secondly given, is a modification; hence the modified charge cannot be held to be the same as the original charge, and to mean the same thing. The modified charge does not say that the mere fact that the

letter was in the handwriting of the defendant was of itself, without any other circumstance and without any reference to any of the other evidence in the case, sufficient to warrant the inference or conclusion that the defendant mailed the letter. The exception to the modified charge must be held not to have been well taken. *United States v. Noelke*, 1 FED. REP. 426, 442.

The exception to the charge that, even without the evidence of Mrs. Sibley, the jury might find, from the other circumstances in the case, that a sufficient case had been made out to authorize the defendant's conviction, must be overruled. The bill of exceptions does not set forth all the evidence, so that this court can see what all the other circumstances in the case were.

The judgment of the district court must be affirmed.

In re BURCHELL, Bankrupt.

(District Court, S. D. New York. October 8, 1880.)

1. **CONTRACT—CONSIDERATION—EXTENSION—DEBT.**—A written promise to pay the debt of another, in consideration of an extension of time, will constitute a valid contract.
2. **SAME—ASSIGNOR.**—In such case the assignor of the debt is not a necessary party to such contract.
3. **COMPOSITION—DISCHARGE.**—The acceptance of a composition from the principal debtor does not discharge any party collaterally liable for the same debt.
4. **BANKRUPTCY—PROVABLE CLAIM.**—Burchell owed Bigler & Co. \$5,257.79 for the construction of an ice-house. Bigler & Co. owed Turck & Burhaus about \$1,600 for work and materials furnished in the construction of the same. Bigler & Co. assigned their claim to a creditor named Ward, and subsequently became bankrupts. June 9, 1878, Bigler & Co. entered into a composition of 30 per cent. with their creditors. June 12, 1878, Ward, Turck & Burhaus, and Burchell entered into an agreement under which Burchell promised to pay Turck & Burhaus \$1,200, and give his notes to Ward for \$3,457, payable in one and two months each. Burchell thereafter became bankrupt, without having paid Turck & Burhaus or the notes held by Ward. Ward thereupon proved against the estate of Burchell for the whole

debt, *i. e.*, \$5,257.79, and in March, 1878, Turck & Burhaus received \$400 from Bigler & Co. in lieu of the sum due them under the composition, and gave a receipt "in full of all claims that we have against him (Bigler) or them (Bigler & Co.) on account of the building, ice house," etc. Held, that Turck & Burhaus still had a provable claim against the estate of Burchell for \$1,200.

W. H. Regensberger, for creditor.

S. Untermeyer, for assignee.

CHOATE, D. J. This is an appeal from the decision of a register expunging a proof of debt.

The claimants, Turck & Burhaus, claim that the bankrupt is indebted to them in the sum of \$1,200, under the following circumstances: The firm of Bigler & Co. contracted to build an ice-house for the bankrupt in Greene county, New York. These claimants, being partners, furnished materials and did work upon the ice-house. Bigler & Co. thus became indebted to these creditors for the contract price of \$3,000, of which there remained still due about \$1,550 or \$1,600. Bigler & Co. failed, and were in bankruptcy. They proposed a composition with their creditors, which was accepted and confirmed June 9, 1878, of 30 per cent., payable in six equal semi-annual instalments, for which they were to give notes. For this balance of about \$1,600 claimants held their due-bill or promissory note.

Prior to their bankruptcy, Bigler & Co. had assigned to one Ward their claim against the bankrupt, which amounted to \$5,257.79. Ward was their creditor, and this assignment was to secure him. Ward threatened the bankrupt with a suit to recover this debt. The bankrupt sent for Ward and these claimants, whose claim against Bigler & Co. he was aware of, and the bankrupt, Ward, and these claimants entered into an agreement in writing for the settlement of the debt. The paper was executed by the three parties on the twelfth of June, 1878. It was in the following form:

"On settlement this day of Bigler claim, total
amount - - - - - \$5,257 79

Paid as follows—

Kept back for Turck & Burhaus the
sum of - - - - - \$1,200 00

For Tobias New the sum of - - - 600 79

————— 1,800 79

Gave Ward this sum, - - - - - \$3,457 00

In two notes for one and two months—half each.

June 12, 1878. This settlement made in presence of Mr. Burhaus, Mr. Ward, and myself, at my office.

"JOHN J. BURCHELL,

"L. C. WARD,

"TURCK & BURHAUS."

Tobias New was another party to whom Bigler & Co. were indebted for work on the ice-house.

This contract, I think, is to be construed as containing a promise, on the part of the bankrupt, to pay these claimants \$1,200 on account of Bigler's debt to them. It is objected to by the assignee on the grounds that the promise was without consideration, and that it was a promise to pay the debt of another. The time given to the bankrupt for the balance of \$3,457, for which Ward took his notes, was an ample consideration for this promise to pay the claimants; and if the promise were a promise to pay the debt of another, it was valid, being in writing and made upon a new consideration. It is also urged that the agreement was void because Bigler & Co. were not parties to it. I think, however, there is nothing in this objection. Ward, as assignee of this debt, which was overdue, had power, as it seems to me, to make this arrangement for its payment. He could authorize a part of the money which he was entitled to exact of Burchell to go to Turck & Burhaus, if he saw fit. It may be that if he did so Bigler & Co. could make him account for it as received by himself, but this could not make the promise to pay his appointee instead of himself illegal. It is also claimed that the promise to pay Turck & Burhaus was

conditional on the notes being paid, and that, as the notes were not paid, and Burchell went into bankruptcy, the promise became null and void. The written agreement itself contains no condition whatever. The giving of notes for the balance, and the expression "Paid as follows," show clearly, I think, that the promise to pay was unconditional; nor does the parol evidence show any such condition, if parol evidence could be received for the purpose.

There being, then, a valid obligation on the part of the bankrupt to pay the claimants \$1,200 on account of Bigler & Co.'s original debt, it continues in force, unless discharged by what has since taken place. That it has been so discharged, is the claim of the assignee and the ruling of the register. Ward has proved under his assignment from Bigler & Co., for the whole debt due to Bigler & Co., \$5,257.79, notwithstanding this agreement with the bankrupt by which \$1,200 of it was to be paid to the claimants. He seems to have proceeded, in doing so, on the theory that, as the notes were not paid, the promise to pay the claimants became void. In this, I think, he was mistaken. Since making that agreement he has made a settlement with Bigler & Co. and assigned, at their request, his claim against the bankrupt to another. If it were proved, as contended by the assignee, that these claimants and Ward had agreed that he should prove for the whole debt and pay them the dividend upon their share of it, they would be estopped to prove separately for their share. But the testimony does not sustain this point; on the contrary, both Burhaus and Ward deny that there has been any subsequent agreement between them of this character.

The fact that Ward has proved for too much cannot affect the right of the claimants. Then, as to the acts of the claimants themselves, it appears that, notwithstanding their agreement with the bankrupt and Ward, they retained Bigler & Co.'s due-bill for the whole debt, \$1,600, and did not take the composition notes. And in March, 1880, they made a settlement with Bigler & Co., receiving \$400, and giving up the due-bill, and giving a receipt "in full of all claims that

we have against him (Bigler) or them (Bigler & Co.) on account of the building, ice-house," etc. It is on account of this transaction that the register has ruled against the claimants. He says in his opinion: "This seems to me to control the whole matter. Whatever Turck & Burhaus may have claimed against Burchell came through the indebtedness of Bigler to them. This indebtedness having been acquitted by Bigler, nothing remains as a foundation for a claim against Burchell. This proof of debt, then, is founded on mistake and should be expunged." "I am unable to concur in this conclusion. Prior to the twelfth of June, 1878, by virtue of the composition proceedings, Bigler was chargeable with 30 per cent. on the whole \$1,600. Turck & Burhaus were bound by the composition.

By the agreement of June 12th they acquired a valid claim upon the bankrupt for \$1,200. Whether this agreement is to be considered as merely a collateral obligation to that of Bigler & Co., or whether it operated to discharge absolutely \$1,200 of Bigler's original debt, is immaterial. The claimants were entitled to avail themselves of both obligations. The amount of their 30 per cent. composition became fixed by the confirmation, and it seems that they would not forfeit any part of that, because another party afterwards, for a new consideration, promised to pay them something more on Bigler's original debt. They could not receive, as between themselves and other creditors of Bigler, more than the stipulated composition out of Bigler's estate. But the further amount thus promised was not to come out of Bigler's estate. The \$400 was paid, as appears by the evidence, in lieu of the composition due to these claimants from Bigler & Co., and the agreement was express that it was to release only Bigler and Bigler & Co.; and there is nothing in the form of the receipt inconsistent with this. It appears that Burhaus refused to accept it in discharge of Burchell also. Even if it was more than Bigler & Co. were bound to pay as a composition, on the ground that the agreement of June 12th extinguished \$1,200 of the debt of Bigler, and that in consequence of this fact the obligation to pay the composition was modified and

reduced to 30 per cent. on the balance, which I am by no means prepared to admit, yet a mistake of this kind would not enure to the benefit of Burchell's estate; and on that theory there ceased to be any connection between the obligation of Burchell and that of Bigler after June 12th. If, however, Burchell's obligation did not extinguish any part of Bigler's original debt, but was collateral thereto, then accepting a composition from the principal debtor does not discharge any party collaterally liable for the same debt. The payment was a settlement of a claim for a composition about which there was some little question as to the amount that should be paid, and its legal effect as a payment cannot be held to be greater than would that of the payment of any composition.

For these reasons I think the obligation of the bankrupt has not been discharged, and the claim must be allowed.

PUTNAM v. TINKHAM.

(Circuit Court, D. Connecticut. October 23, 1880.)

1. RE-ISSUE—IDENTITY OF INVENTION.—Re-issued letters patent for an improved bottle stopper, granted December 23, 1879, to Henry W. Putnam, assignee of Joel B. Miller, *held void*, because it appeared on its face to be for a different invention from that which was embraced in the original patent.

Arthur v. Briesen, for plaintiff.

E. A. West, for defendant.

SHIPMAN, D. J. This is a bill in equity, based upon the alleged infringement of re-issued letters patent for an improved bottle stopper, which were granted on December 23, 1879, to Henry W. Putnam, assignee of Joel B. Miller, deceased. The original patent to Miller was dated October 27, 1874.

The invention described in the re-issued patent is a bottle stopper, which is placed within the bottle to close the mouth from below. A spring bail and handle are permanently at-

tached in any manner to the upper end of such stopper. The body of the bail is preferably staple shaped, being made of two legs or branches which bow outwards so as to form springs which bear against the sides of the throat of the bottle. "The upper part of the bail forms a loop larger in diameter than the interior of the bottle neck, which loop serves as a convenient handle for the operation of the stopper, and also prevents the entire device from slipping into the bottle." The re-issued patent includes a bail rigidly fastened to the stopper, and a bail hinged or jointed to the top of the stopper.

The claims are as follows:

"*First.* The combination of an internal bottle stopper with an upwardly projecting bail, C, said bail having an enlargement, F, which is adapted to suspend the stopper from the mouth of the bottle, and a handle portion above said enlargement, substantially as herein shown and described.

"*Second.* The combination of an internal bottle stopper with a bail, C, which is constructed to form springs, *aa*, above the stopper, substantially as herein shown and described.

"*Third.* The combination of an internal bottle stopper with a bail, C, forming the springs, *a*, and the enlargement, F, above said springs, substantially as herein shown and described.

"*Fourth.* The internal bottle stopper, provided with a hinged or jointed bail, C, which is composed of two elastic legs or branches, *a*, and of an eye or finger loop, substantially as herein shown and described."

The defendant's stopper is made under re-issued letters patent of June 17, 1879, to Charles G. Hutchinson, the original patent having been dated April 8, 1879. The Miller patent was bought by the plaintiff in October, 1879, and was thereafter re-issued.

The defendant's device consists, in substance, as stated in the specification of the re-issue, "of a laterally or outwardly-yielding spring applied to the stopper or plug proper, and adapted to extend up through, and press against, the interior of the neck of the bottle, so that the stopper will thereby be suspended in a position to either close or open the neck as the spring is moved either up or down, and be held in either

its closed or open position by the action of the spring." The spring which is used is a continuous flexible wire attached at one end to the stopper, and bent so as to resemble somewhat the figure 8 in form; the other end of the wire being bent back to a point near the end which is attached to the plug, and being left free. The top of the spring serves as a loop to receive the finger or a hook by which the stopper is drawn up. This handle or spring is rigidly fastened to the stopper.

The defendant denies infringement and the novelty of the invention as described in the first three claims of the plaintiff's re-issued patent, and also insists that the re-issue is void because it is for a different invention from that which is described and claimed in the original patent. The last question seems to me to be a vital one in the case, and I shall not, therefore, decide the other points.

The original Miller patent made the invention to consist of a stopper with a handle or bail hinged or jointed to the top of the stopper, and carefully insists that the peculiar mode of construction is a distinguishing feature of the invention. The patentee says in his specification: "I am aware that internally-located bottle stoppers have been provided with vertical rigid handles or stems for manipulating the same; but, owing to the rigid character of the handle, the stopper is apt to be forced down into the bottle during transportation, and furthermore, in dispensing the contents of the bottle, a rigid handle will interfere with the free flow of the liquid. My invention is designed to avoid these defects, for, by hinging or jointing the handle to the stopper, the same can be turned away from the mouth of the bottle in dispensing the contents thereof; and, furthermore, by making the handle of a bow shape, or with two legs or branches, the latter will, owing to their elasticity, spring against the throat of the bottle, so as to render the casual displacement of the stopper impossible."

The claim is as follows: "The internally located bottle stopper, B, provided with a hinged or jointed handle or bail, C, composed of two elastic legs or branches, and an eye or finger loop, as and for the purpose set forth."

He virtually disclaims rigid handles, and says that his

invention is designed to avoid such a method of construction. It is useless to say that by a rigid handle he merely meant a bail without spring action, for the entire paragraph shows that he also meant a handle so jointed or hinged to the stopper that it could be turned away from the mouth of the bottle. He intended to point out that his handle or bail was both hinged to the stopper and had elastic legs. The re-issue covers a device in which the bail is attached to the stopper in any manner. The hinged construction is briefly alluded to as one which accomplishes a certain result.

The file wrapper and contents of the original patent furthermore show that the specification accompanying the first and rejected application described the same method of construction which now re-appears in the re-issue, and which the patentee, apparently, was obliged to eliminate from the specification before he could obtain a patent. The handle was to be attached to the stopper in any manner, and was preferably staple shaped. The application was thrice rejected. Finally, the quoted paragraph respecting rigid handles was inserted, and the patent was granted. In the original patent, the patentee informed the public, with precision and after deliberation, that his invention was an improvement upon a rigid handle, and limited himself to a hinged or jointed handle. It has now become important for the plaintiff to possess himself of the territory which his assignor attempted to occupy, but abandoned, and the ownership of which he virtually disclaimed.

A comparison of the two patents shows that the case is clearly within the principles which have been recently and frequently announced by the supreme court as applicable to re-issues. The re-issue is void, because it is, on its face, for a different invention from that which was embraced in the original patent. *Russell v. Dodge*, 93 U. S. 460; *Railway Co. v. Sayles*, 97 U. S. 554; *Powder Co. v. Powder Works*, 98 U. S. 126; *Leggett v. Avery*, 17 O. G. 445.

The bill should be dismissed.

NOTE. See *Siebert Cylinder Oil Cup Co. v. Harper Steam Lubricator Co.* ante, 328.

PROCTOR v. BRILL and others.*

(Circuit Court, E. D. Pennsylvania. October 15, 1880.)

1. PATENT—SEPARATE CLAIMS—DAMAGES FOR INFRINGEMENT WHERE NO SEPARATE LICENSE FEE HAS BEEN ESTABLISHED.—In an action at law for infringement of a patent containing two claims, if the evidence shows that the patent is valid as respects one claim only, and the plaintiff has established no license fee for the separate use of the device covered by such claim, he can recover only nominal damages.
2. SAME—IMPROVEMENT IN POLE COUPLING—VALIDITY.—Letters patent No. 21,026, for improvement in pole coupling for railroad cars, sustained as to the device included in the second claim, viz., a method of coupling the pole so that its weight shall be sustained by the car instead of bearing upon the horses.

This was an action at law to recover damages for the infringement of letters patent No. 21,026, for an improvement in pole coupling for railroad cars. The patent was issued in 1858 to Blaney E. Sampson, was re-issued in 1860, and was, in 1872, extended for seven years. It contained two claims—*First*, an open jaw for coupling a street-car pole to the car; and, *second*, a method of supporting a street-car pole so as to take the weight of the pole off the horses' necks. The plaintiff testified that he had an established license fee of \$10 a car for the use of the open jaw covered by the first claim alone, and a license fee of \$50 for the use of the devices included in both claims; but that he had never collected any license fee for the use of the pole-support device alone, covered by the second claim.

Evidence was given by the defendants of prior use of the devices included in both claims, in New York, Jersey City, Troy, and other places; and of the device covered by the first claim, in Philadelphia. Rebutting testimony was given by the plaintiff as to the prior use of the device covered by the second claim, but not as to the prior use of the device covered by the first claim.

After the evidence was in, the plaintiff's counsel stated to the jury that he abandoned the first claim.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

Nathan H. Sharpless, for plaintiff.

Walter George Smith and Francis Rawle, for defendants.

BUTLER, D. J., (*charging jury.*) On the twenty-seventh of July, 1858, letters patent were issued to Blaney E. Sampson, re-issued in February, 1860, and, upon their expiration in July, 1872, they were extended for a further term of seven years. Of these letters patent the plaintiff, Mr. Proctor, became the owner by assignment, as well for the period covered by the extension as that for which they were originally issued.

This patent, as you have learned, is for an improvement in pole coupling for railroad cars, which is described by the inventor to consist in so applying or constructing the car pole that it shall be sustained at the proper height to couple with the car bunter, and be self coupling at all horizontal angles of presentation to which the pole may be liable, and in so applying the pole that its weight shall be sustained by the car, instead of bearing upon the horses, as illustrated by the model here exhibited. What the inventor claims as his invention is—*First*, the method of applying the pole so that it shall be in position to shackle when brought against the platform at any angle of presentation; and, *second*, so applying the pole that it shall be supported by the car instead of by the horses. The devices described are so simple, and so well illustrated by the model exhibited, as to require no comment from the court. The description and claim have been several times read, and the model exhibited and explained so fully, that I would but waste your time and our own by dwelling on this subject. This model, I repeat, exhibits in a form so simple the claims of the plaintiff that it is readily understood. [Taking the model in hand, the court pointed out its parts and explained it as follows:]

The first claim consists substantially of the open jaw, which affords an opportunity of shackling and unshackling the pole at any angle from the front or side, as you observe. I should say to you that the second claim consists substantially in this brace or pole support, together with its rear connection or support, as described in the patent. You will observe

that this pin is stationary, so that when the pole is unshackled the lower part remains in position; and, as described by Dr. Cresson, the slot in the brace may be run upon the bottom of it, and thus held up steadily, in a horizontal position, while the pin is being run through. In the same way it may be held thus steady while the pin is being withdrawn and the pole unshackled.

The plaintiff, charging the defendants with infringement of his rights under the patent, has brought this suit to recover compensation for the injury which he says has thus been inflicted. That the defendants manufactured cars and poles, using the plaintiff's devices substantially for coupling and supporting the pole, is shown by the testimony, and is not denied. The number of cars and poles to which the devices were so applied is stated to be from 62 to 87 in number. If the case rested here the plaintiff would be entitled to recover. Your verdict, however, in such case, would be for nominal damages only, consisting of six cents, for you would thus have nothing by which to determine that more had been sustained.

The plaintiff, however, has undertaken to satisfy you that he had an established royalty, or license fee, for the use of his patent; which fee he testified is \$50 for the devices covered by the two claims. If you find that he had such established general license fee,—that is to say, that he charged and was paid, not in a single instance, but generally, such sum as he states, per car, for the use of his invention,—this would afford a standard or guide whereby the extent of his injury from the defendants' use might be ascertained and measured, in case the patent were found to be valid as respects both the claims before stated. And in such case it would justify you in rendering a verdict in his favor for a sum equal to \$50 for each of the several cars and poles manufactured by the defendants with the plaintiff's devices for shackling and supporting the pole. For, while the defendants did not themselves use the car and pole with a device thus upon it, their act of selling the car and pole so manufactured for use by others, would, under the circumstances stated, render them responsible for the use. The plaintiff further testifies that he had a

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separate and general license fee for the use of the jaw, which virtually represents, as I have before stated, the first claim of the patent, of \$10 per car. There is no evidence of any license fee having been established for the use of the brace, or pole support, with its posterior attachment, or rest, which constitutes the second claim. If, therefore, the patent were found to be valid as respects the first claim, and not as respects the second, the plaintiff's right to recover would be limited to a sum not exceeding \$10 per car. On the other hand, if the patent were found to be valid as respects the second claim—the brace, with its support—and not valid as respects the first, then, inasmuch as no license fee has been established for the separate use of this device and its attachments, the plaintiff's right to recover would be limited to nominal damages only, which I have stated to you would be six cents.

Thus far I have spoken of the plaintiff's *prima facie* case alone, and the findings referred to would, I repeat, be justified if the testimony went no further. The defendants, however, assert, and have produced evidence tending to prove—*First*, that in the year 1874, and again in 1875, the plaintiff authorized them to apply the patented devices gratuitously, thereafter, to their cars and poles; and, *second*, that the devices were not new, as respects either of the claims, at the time of the alleged invention by Sampson; and that the patent is, therefore, invalid.

If the first of these allegations is proved to your satisfaction, the plaintiff cannot recover, in any event, for the use of the device by defendants on the cars and poles manufactured after such authorization. If the second allegation is proved, to wit, that the devices—both of them—covered by the claims were not new, but had been known and similarly applied and used before Sampson's alleged invention, the plaintiff cannot recover anything; for, in such case, the patent is void. If one of the claims,—and I invite your attention particularly to these distinctions,—if one of the claims was not new at the time referred to, and the other was, the validity of the patent and the plaintiff's right to recover is limited to the latter—to the one which was new. Thus we

are brought to the real questions involved in the case. The burden of proof respecting them rests on the defendants. The allegations must be proved, or must be disregarded. The presumptions are in favor of the patent as respects the novelty of the invention claimed, and especially so in view of the long time it has run without successful challenge. In this connection, at this time, I will read and answer, before turning to the evidence bearing upon the questions seriously contested, certain points presented by the defendants' counsel. The preceding points having been withdrawn, I read now point 7:

"If the jury believe that substantially the same devices or device that is claimed in the plaintiff's patent was in use for a similar purpose on carriages, wagons, or steam cars before Sampson conceived his device, the application of such old devices to a street car is not patentable, and a patent granted for such application would be void."

If this device or these devices embraced in this patent were previously applied, as suggested in this point, to other vehicles than street cars, for a similar use, the application of them to a street car would not entitle Mr. Sampson to a patent; and in such event his patent is void.

(8.) "The subject-matter of the first claim of the letters patent in the suit is an open jaw, fixed to the front end of a street car, open on both sides as well as at the front, so that the pole of the car can be coupled or shackled with equal facility when directly in front or when presented at any angle on either side."

That is true. It is substantially what the court has already said to you.

(9.) "The subject-matter of the second claim is a brace attached to the under part of the car pole, made with a forked end next the car, adapted to rest upon or fit into any suitable support on the front of the car, so that the weight of the front end of the pole is supported, and the weight thereof taken off the necks of the horses."

The court will affirm that also, adding these words: "As

described in the letters patent, and exhibited by the plaintiff's model."

(10.) "The manner in which the forked brace is supported is not a part of the second claim of the patent. It can be done"—that is, it can be supported, as I understand it—"in various ways, shown by the evidence in this case, provided some substantial support is provided for this forked brace at the fork, so that the car pole may be held in position by it."

I affirm that also, with the addition and qualification, viz.: with any support by which it can be held steadily in a horizontal position for all purposes connected with the use of the pole, including that of shackling, as I have before described to you.

(11.) "If the jury believe that either or both of the devices claimed as new, in the plaintiff's patent, were known to or used by even a single person prior to the date at which Sampson, the patentee, first actually conceived his invention, they will consider that such claim or claims are void, and they will not consider such claim, or both claims, as the case may be, in making up their verdict."

That is true. It is what I have said to you. If you find that either of these claims was old at the time of Sampson's conception, then he was entitled to no patent for such claim. If both were old, he was entitled to no patent at all.

Now, gentlemen, are the allegations, or either of them, the defences set up proved? In support of the first, to-wit, that the plaintiff authorized the use, you have the testimony of Mr. Brill,—not the defendant, but the young man who was upon the stand. Mr. Brill gives you his statement of the plaintiff's interview with him on this subject. You have heard the comments of counsel upon this statement, as well as the answer of the plaintiff, in which he denies the truth and accuracy of Mr. Brill's statements. You will judge whether it is or is not probable that the plaintiff would authorize the defendants to use his devices without looking to them for compensation, and will determine, from all the evidence bearing on the question, whether he did so or not.

If he did, then, as before stated, he cannot recover for the sale of cars thereafter made. In support of the second allegation, which is that these devices were old, you have the testimony of a number of witnesses produced by the defendants, who say, as you have heard, that they saw in use devices substantially identical with the plaintiff's, in different places, which they name, prior to 1853, when Mr. Sampson is alleged to have made the invention embraced in the patent here involved; and have placed before you models or illustrations of the devices to which they refer. If you find that Mr. Sampson's daughters, who testified here, are mistaken respecting the time when the first model was produced, (they fix it, as you will recollect, in 1853,) and that the time at which his invention was made should be placed at a later date, as the defendants' counsel argues, you will then also consider other devices referred to by the defendants' witnesses, as seen in use subsequently to 1853, and down to such time as you find Sampson's discovery to have been made. Are the witnesses here referred to mistaken or inaccurate, either as respects the character of the devices or the time when they were seen in use? You must determine whether the models or illustrations exhibited fairly represent what the witnesses saw; and whether the devices in use, of which they spoke, were substantially identical with the plaintiff's. In considering this, you will remember the testimony of the experts and the comments of counsel. A comparison of the models and illustrations referred to by the witnesses, with the plaintiff's model of his devices, will afford you a pretty safe guide respecting the identity of the devices referred to by the defendants' witnesses, as seen by them in use at the dates to which they testify, with the devices covered by the plaintiff's patent. Can you rely on the accuracy of the witnesses who testify to the prior use of similar devices? Are they or not mistaken or inaccurate in stating what they saw, or the time when they saw it? In this connection you will consider the testimony of the witnesses called by the plaintiff in rebuttal, and the comments of counsel on this evidence. If the testimony of the defendants' witnesses, respecting the devices which they

saw in use prior to the discovery by Sampson, is true, as regards the description of devices, and the time they were seen in use, you will judge whether the devices covered by the plaintiff's patent were new at the time of the alleged invention by Sampson, or whether they were old, as alleged by the defendants.

As respects the open jaw, which virtually constitutes the first claim of the patent, there would seem to be no room for doubt that it was not new, and the plaintiff's counsel, with commendable candor, has declared in your presence that he cannot, in view of the evidence, urge you to find that it was new. Thus the question seems to be narrowed down to the inquiry whether the brace, or pole support, with its posterior connection or rest, which virtually constitutes its second claim of the patent, was new at the time of the alleged discovery by Sampson. I repeat to you, the case, after the close of the testimony and the summing up of counsel, seems to be narrowed down to the question whether or not this device, which constitutes the second claim of the patent, was old at the time of Sampson's alleged discovery. If, therefore, a careful examination of all the evidence satisfies you that this device, which constitutes the second claim, was not new, you will decide this question in the plaintiff's favor, and find that the patent is valid to this extent. If you find that this [referring to the model of it] was also old, then you will find that the patent is invalid as respects both claims. If you do not find that this was old, but conclude that Sampson first invented and applied it, then your verdict, as I have suggested, will be in favor of the plaintiff, and you will treat the patent as valid to that extent. But if the patent is valid only to this extent, (and it seems clear that it is not valid beyond this extent,) then, inasmuch as there is no evidence of a license fee which will enable you to ascertain any sum in which the plaintiff has been damnified or injured on this account, your verdict must be for the plaintiff for nominal damages only. Thus it would seem that in no event, under the evidence, and the plaintiff's position here, can you render a verdict for the plaintiff for anything beyond nominal dam-

ages. If, on the other hand, as I have before stated, you find this device, which constitutes the second claim, also to have been old at the time of the alleged invention by Sampson, and thus find the patent invalid as respects both the claims, your verdict must be for the defendants generally.

The verdict was for plaintiff for six cents damages.

ROOT v. E. N. WELCH MANUF'G CO.

(Circuit Court, D. Connecticut. ———, 1880.)

1. PATENT—INVENTION.—Re-issued letters patent, dated August 3, 1875, for an improvement in clock dials, *held void*, upon the ground that the supposed invention was not a part of the thing patented.

H. A. Seymour and Rodney Mason, for plaintiff.

Charles E. Mitchell and Richard D. Hubbard, for defendant.

SHIPMAN, D. J. This is a bill in equity to restrain the defendant from the alleged infringement of re-issued letters patent, dated August 3, 1875, for an improvement in clock dials. The original patent was issued to the plaintiff on May 10, 1859, and was subsequently extended for seven years, from May 10, 1873. The plaintiff's invention was made in the spring of 1855. An application for a patent was filed on September 5, 1855, which was rejected, and was withdrawn on January 30, 1858. A renewed application was filed January 31, 1859.

Prior to the date of the plaintiff's invention, painted metallic dials were commonly used upon the ordinary wooden clocks, then and now largely manufactured in Connecticut. The painted surface of the dials was apt to crack, and much time was required to paint and dry them properly. For the purpose of avoiding these difficulties, the plaintiff made the invention which subsequently became the subject of his letters patent.

Paper dials were known prior to the date of the invention. Metallic backs, with a paper dial, the edge of the back being

turned over upon the paper so as to secure the paper to the back, were also known, and had been made by the Terry Manufacturing Company in 1854. The plaintiff's invention consisted in the combination of a paper dial, a back,—preferably of zinc,—and a metallic cap or frame or scalp, which united the back and the dial. The function of the cap or frame or scalp, as correctly described by the plaintiff's expert, was "to cover the edge of the dial by the inner edge of said frame, and hold the dial firmly against the back, so that its edge will not warp up or become displaced, while the outer edge of said frame is turned over and embraces the edge of the back, while the body of the scalp serves to unite these two edges, which I have described, and thereby the three parts, to-wit, the dial, the back, and the frame, are all held together, and constitute, as a whole, a clock dial." The patentee, after referring to the drawings, which show the form of the frame and of back, which will be described hereafter, says, in the re-issued specification, that the back may be made entirely flat, if desired. The dial may be made of the same diameter as the back, and the frame made plain and turned over the edges of the dial and the back, thus compressing them thoroughly together. When it is desired to make a moulding frame and back, the edge of the back is made nearly the shape of the frame. The dial B is made of such diameter as to just fill in between the raised portion from the flat surface of the back A. The frame or scalp C is placed over the dial B, and the edge D turned over the edge of the back A, and pressed together, thus firmly compressing the edge of the dial between the inner edge of the frame C and back A. The claims of the re-issued patent were as follows:

First. The combination of a metallic scalp, with a clock dial, substantially as and for the purpose described.

Second. The combination of a metallic scalp and zinc back, with a paper dial, substantially as and for the purpose shown.

Third. The combination of a zinc back, with a paper dial, substantially as and for the purpose set forth.

Fourth. The combination of metallic back and paper dial,

with a rim of "struck-up" sheet metal, substantially as and for the purpose described.

Fifth. As a new article of manufacture, the combination of a clock dial B, metallic back A, and frame C, substantially as and for the purpose set forth.

On December 24, 1877, and before this suit was brought, the plaintiff duly made and entered in the patent-office a disclaimer, whereby he disclaimed the third clause of the claim, and further disclaimed, as follows:

"Further, in the first and second clauses of said claim, wherein 'a metallic scalp' forms one of the elements of the combinations respectively covered by said claims, a disclaimer is hereby entered to a metallic scalp, broadly considered, and the scope of the claims is restricted to the combinations of parts specified in said first and second claims, when the metallic scalp therein specified is provided with lateral flanges on its outer and inner edges, substantially as illustrated in the drawings forming a part of said re-issued letters patent. Further, your petitioner enters a disclaimer to 'a rim of struck-up sheet metal,' broadly considered as entering into the fourth clause of claim, and restricts said claim to the combination of parts therein specified, when the 'rim of struck-up sheet metal,' therein specified, is formed on the edge of the metallic back, and serves to govern the position of the dial, substantially as illustrated in the drawings forming a part of said re-issued letters patent. Further, your petitioner enters a disclaimer to 'frame C,' broadly considered as entering into the combination of parts specified in the fifth clause of claim, and restricts the scope of said claim to the combination of parts therein specified, when the 'frame C' is provided with lateral flanges on its outer and inner edges, substantially as illustrated in the drawings of said re-issued letters patent."

The plaintiff stated in the disclaimer that he had secured claims in the re-issued patent which were too broad, and included that of which he was not the first inventor. He made the disclaimer in consequence of having seen a clock dial which had been sold by the Terry Manufacturing Com-

pany, and which he supposed preceded the date of his invention. In fact, the dial was made by himself in 1856. The drawings of the patent show that the inside edge of the frame covering the edge of the paper dial is a lateral flange. The outside part of the frame, which turns over the edge of the back, is also a lateral flange. I am of opinion that infringement of the first, second, and fifth claims is clearly proved, and that want of novelty is not proved. It is conceded that there is no infringement of the fourth claim.

The answer sets up divers defences. The only one which I think it is desirable to examine particularly is that "the supposed invention remaining after said disclaimer was not, and is not, a material part of the thing patented." The defendant says that the invention consisted in a combination of paper dial, back, and metallic frame or rim; that the shape of the rim was entirely a matter of taste, ornament, or convenience; that there is nothing functional in the form of the rim, and that the specification shows clearly that the form of the rim was an immaterial circumstance. The plaintiff says that the lateral flanges, and their offices, were shown in the drawings; that the office of the inside lateral flange was "to conceal the edge of the clock dial, and to furnish a flat annular seat against which the front of the dial rests, and by which it is held in position in such a manner as to prevent the dial from coming forward;" and that the office of the outer flange, in addition to its furnishing means by which to secure the scalp to the dial, was to furnish a flat seat upon which the whole dial is supported when placed against the front of a clock case, and through which seat screws may be inserted to secure the dial in place.

The disclaimer admits, in effect, that the patentee was not the first inventor of the combination of a paper dial, a back, and a metallic rim or frame not having lateral flanges on its outer and inner edges, but that this combination was old. It is also a fact that painted dials of one piece of metal, having an outwardly projecting lateral flange, which were secured to the clock case by screws drilled through this flange, were in common use prior to the date of the inven-

tion. The sash upon the door of the clock case was fastened by a catch to this flange. No objection is made to the form of the disclaimer. The question simply is whether there is anything in the specification of the patent, or outside of it, which shows that a material part of the invention consisted in the flanges upon the edges of the frame, as exhibited in the drawings, was an immaterial matter which did not partake of the character of invention. It must be remembered that the question is not whether the flanges perform a certain office, or whether the drawings exhibit the office, but it is whether there was any invention in the means for the performance of such office. The second deflecting plate, in *Dunbar v. Myers*, 94 U. S. 187, performed an office; but the court was of opinion that the addition of such second plate involved no invention. The "close chamber" and the "freezing mixture," in *Brown v. Piper*, 91 U. S. 37, performed the office of preserving fish; but the court was of opinion that the means used were an application of an old process to a new subject, without invention.

An inspection of both the re-issued and the surrendered patents, and of the rejected specification, shows that the flanges constituted no portion of the invention upon which the mind of the inventor rested as important. He says, in substance, that the back may be made plain, or may have a raised and then flattened edge. The dial may have the diameter of the back, or may be made of such diameter as to just fill in between the raised portion from the flat surface of the back. No patentable advantage is ascribed to one shape over another, or to any shape; and there is no suggestion of novelty in the method of attaching the clock dial to the case, or the sash to the frame. Furthermore, the backs of the painted dials, which were commonly used in wooden clocks at the date of the invention, were made substantially like the back of the dial shown in the drawings; that is to say, their edges were raised and then flattened, so as to give room for the hands inside the sunken portion of the dial, and so as to form a peripheral flange by which the back could be attached to the case. The patentee put a paper dial, upon which the

figures denoting the hours were printed, within the rim of the back, instead of having the figures painted upon the painted surface of the plate; and, in order to keep the paper dial in place, united it to the back by a metallic rim, one edge of which covered the edge of the dial, and the other edge was turned over the outside edge of the back. The shape of the rim was determined by the shape of the back which might be desirable in any particular style of clock, or as a matter of ornament. Flanges were not used, because they made a seat for attaching the dial to the case, but were used to conform to the old style of back, when that style, which had an old function of its own, was used. Given the two facts that a clock dial, with printed paper dial, a metallic back, and a metallic rim uniting the back and the paper dial, was old; and that a metallic back, with a lateral outside flange, through which screws were inserted to fasten the dial to the clock case, was commonly in use; was it any material part of the invention to make the rim to correspond generally with the old pattern of the back? I am of opinion that it was not; but that the shape of the rim was a matter merely of mechanical convenience. The inside lateral flange has the same offices which are performed by any edge of the rim, and the form is in the one which would be naturally adopted upon a sunken dial plate. The bill should be dismissed.

HAMILTON v. KINGSBURY and another.

(Circuit Court, N. D. New York. ———, 1880.)

1. PATENT—ASSIGNMENT—NOTICE.—*Held*, under the circumstances of this case, that there was enough in the terms "right, title, and interest," in the assignment of a patent, to put any purchaser from the assignors, immediate or subsequent, on inquiry, and to charge him with notice of what such inquiry, if made of the grantor of the assignors, would have disclosed.
2. SAME—NOTICE—ESTOPPEL.—*Held, further*, that such grantor was not bound by any suppression of the truth by the said assignors, or any failure upon their part to disclose the exact condition of their title, so long as they assumed to convey only their "right, title, and interest."

Geo. H. Lathrop, for plaintiff.

William F. Cogswell, for defendants.

BLATCHFORD, C. J. When this case was before the court, on the original bill and the plea thereto, it was decided (14 O. G. of Pat. Off. 448) that the proper construction of the recorded conveyance of August 27, 1866, from Milton A. Hamilton to Lombard & Thompson, was that Lombard & Thompson acquired thereby the right to make as well as the right to use, and to sell to be used, the patented saw hangings, as they are or may be applied to muley or single upright mill saws, for, to, and in the state of New York; such right to use and to sell to be used being exclusive, but the grantor reserving to himself a right to make in common with the grantees. The plea was allowed, and the plaintiff then amended the bill by setting forth two unrecorded instruments, made August 27, 1866, one executed by Milton A. Hamilton of the one part and Lombard & Thompson of the other part, and the other executed by Milton A. Hamilton and then delivered to Lombard & Thompson. There was a plea to the amended bill, and a replication to the plea, and proofs were taken thereon. The main point of the plea was that the defendants were *bona fide* purchasers under the said recorded conveyance of August 27, 1866, without notice of either of the said unrecorded instruments of that date. The case was submitted to the court on briefs, without oral argument, (17 O. G. of Pat. Off. 147,) and the court overruled the plea. The plaintiff contended that under the three instruments of August 27, 1866, taken together, Lombard & Thompson acquired no right to make the invention, except in a certain contingency which had never happened; that the three instruments were contemporaneous and were all portions of the same transaction, and must all be read together to determine the intent of the parties to the transaction; that the three instruments were consistent with no intention not to convey to Lombard & Thompson, by the recorded conveyance, any right to manufacture the invention; that if the recorded conveyance gave to them the right to manufacture, the other two instruments had no meaning; and that the instruments were, (1) a license,

which in terms gave the licensees no power to manufacture; (2) an agreement by which the licensor agreed to furnish the hangings to the licensees at fixed prices, and the licensees agreed that they would not manufacture so long as the licensor kept his agreement; (3) a permission from the licensor to the licensees to manufacture in case the licensor failed to perform his agreement. The court held that the three instruments, taken together, must have the interpretation claimed for them by the plaintiff. The defendants contended that they were *bona fide* purchasers without notice of any instrument but the recorded conveyance of August 27, 1866, and that they were protected from any unrecorded agreement between Milton A. Hamilton and Lombard & Thompson, in the absence of any actual notice thereof. On this question the court said: "The recording act in force when the defendants took their conveyance from Strong & Woodbury, on the tenth of December, 1869, was section 11 of the act of July 4, 1836, (5 U. S. St. at Large, 121,) which provided 'that every patent shall be assignable in law, either as to the whole interest or any undivided part thereof, by any instrument in writing, which assignment, and also every grant and conveyance of the exclusive right under any patent to make and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States shall be recorded in the patent-office within three months from the execution thereof.' It is well settled that mere licenses or contracts conferring the limited and not the exclusive right to exercise some of the privileges secured by the patent are not the subjects of regulation by this statute; and that it relates solely to grants or conveyances of the exclusive right or legal estate vested in the patentee, which leave no interest in the patentee for the particular territory and the particular right to which they relate. Curtis on Patents, (3d Ed.) § 179. Within this rule, the recorded conveyance of August 27, 1866, from Milton A. Hamilton to Lombard & Thompson, is not an assignment of the whole interest in the patent, or any undivided part thereof; nor is it a grant or conveyance of the exclusive right, under the patent, to make

and use, and to grant to others to make and use, the thing patented, within and throughout any specified part or portion of the United States. It is only a license. It reserves to the grantor 'the right to manufacture the said invention.' Whatever right to manufacture the grantees acquired by the face of it, such right was not exclusive in them; therefore, such instrument was not one required to be recorded. Nor were the other two instruments of August 27, 1866, instruments which it was necessary to record. The recording of the instrument of August 27, 1866, which was recorded, was not notice to the defendants that they could safely rely on the record as showing the whole transaction between the parties to the instrument in respect to its subject-matter. The three instruments were all of them valid without recording, as against the defendants, although *bona fide* purchasers without actual notice. Although the recorded instrument of August 27, 1866, may, on its face, convey the right to make to the grantees, seeing it on the record is of no more avail to the defendants than if they had seen it out of the record. The existence of the three instruments, taken together, as limiting the right of Lombard & Thompson, affects the defendants with the consequences of such limitation, for they can have no greater right than Lombard & Thompson had."

Before any order overruling the plea to the amended bill has been made, the defendants now present a petition to the court for a rehearing or a reargument of the case. The ground of the application is set forth in an affidavit made by Mr. Cogswell, the counsel for the defendants, who prepared the brief for the defendants, on the plea to the amended bill, which states that he understood that the case turned on actual notice to the defendants' assignors of the unrecorded agreements between them and Milton A. Hamilton, limiting, as was claimed, the operation of the license given by the latter to such assignors; that he was furnished with the plaintiff's brief just before the case was submitted to the court, and the question upon which the case was decided did not attract his attention until he saw the opinion of the court; that justice to the defendants requires that the case should be

reargued, to the end that the question may be presented whether Milton A. Hamilton, having conferred upon Lombard & Thompson the apparent right to manufacture and sell the patented invention without restriction or reservation, and the power to assign such right to others without such restriction, is not, and the plaintiff, as his assignee, is not, estopped from setting up, as against the defendants, who are innocent third parties, and have bought in good faith such right, relying upon the unconditional and unrestricted license, the limitation or restriction of said license contained in a separate instrument not in any way referred to in said license.

The amended bill alleged that the defendants had constructed machines containing the patented invention with full knowledge of the facts alleged in the bill, among which facts was the existence of the said two unrecorded instruments. The defendants denied knowledge and notice of the existence of said two instruments. No evidence of actual notice of either of them to the defendants was given by the plaintiff.

It is contended for the defendants that a point conclusive against the plaintiff's right was not brought to the attention of the court; that the court held, in its decision on the plea to the original bill, that the words "legal representatives," in the recorded conveyance of August 27, 1866, included "assigns;" that such conveyance was absolute and unconditional, as was held in the same decision, except a reservation not applicable to the question in hand; that the evidence shows that the defendants and their immediate assignors were *bona fide* purchasers for value, without notice; that it is a rule of law that where the owner of property has conferred upon another person a power to dispose of it, and an innocent third party has dealt with such person upon the assumption that he possessed such power so apparently conferred, such owner is estopped from asserting that the power was not what it purported to be, but was limited or restricted by some secret agreement; that the purchase by the defendants was made upon the faith of the title which Milton A. Hamilton had apparently given to Lombard & Thompson, and it would be contrary to justice and good conscience to

permit him, or the plaintiff as his assignee, by a title derived from him subsequently to his conveyance to Lombard & Thompson, to assert his real title against the defendants; that a contrary rule would operate as a fraud by Milton A. Hamilton upon the defendants; that the case is one for the application of the principle in favor of the defendants that where one of two innocent parties must sustain loss from the fraud of a third, such loss must fall upon the one, if either, whose act has enabled such fraud to be committed; that the defendants are innocent purchasers, upon the faith of the apparent title conferred upon Lombard & Thompson; that any fraud which has been committed has been committed by virtue of the evidence of title which the plaintiff's assignor put into the hands of Lombard & Thompson; and that frauds may be perpetrated on the public if the owners of patents, who give absolute assignable licenses, are permitted to treat as infringers purchasers of such licenses, by virtue of a secret agreement entered into at the time of the execution of the license.

Two cases are referred to by the defendants: *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, and *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41. The head note of the first case is that where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner; and that the rights of such third party do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the title or authority he has apparently conferred. The doctrine was limited, by the decision, to the case where the owner had entrusted to another, not merely the possession of the property, but written evidence over his own signature of title thereto, and of an unconditional power of disposition over it. The same doctrine was applied in *Moore v. Metropolitan Nat. Bank*, where it was held that the *bona fide* purchaser for value of a non-negotiable chose in action from one upon whom the

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owner had, by written assignment, conferred the apparent absolute ownership, where the purchase is made upon the faith of such apparent ownership, obtains a valid title as against the real owner, who is estopped from asserting a title in hostility thereto.

Since the decision in this case on the plea to the amended bill, it has been stipulated in writing by the plaintiff that Edmund F. Woodbury would testify that the consideration paid for the conveyance of April 29, 1868, from Lombard & Thompson to Russell, Reese, and the firm of Strong & Woodbury, (consisting of Henry A. Strong and Edmund F. Woodbury,) was the sum of \$4,000, in property and cash; and that the defendants respectively would testify that they paid on the execution and delivery of the conveyance from Strong & Woodbury, of December 10, 1869, to them, the sum of \$1,000 in cash; and that such stipulation be filed and made a part of the record, on the application for a rehearing, with the same effect as though such testimony had been regularly put in by the defendants originally.

In the proofs, Edmund T. Woodbury testified that he negotiated with Lombard the purchase covered by the conveyance of April 29, 1868; that he never heard until the spring of 1877 of the two unrecorded instruments of August 27, 1866; and that the only agreement between Hamilton and Lombard & Thompson, of which he had any information, prior to 1877, was the recorded conveyance of August 27, 1866.

The conveyance of April 29, 1868, from Lombard & Thompson to Russell, Reese, and Strong & Woodbury, recites that "whereas, by virtue of assignment from Milton A. Hamilton, dated August 27, 1866, the right for the state of New York was vested in us, Clinton A. Lombard and John Thompson;" and then it conveys all their "right, title, and interest" in the invention, as secured to them by the patent, for, to, and in the state of New York. The conveyance of July, 1868, from Reese to Russell and Strong & Woodbury, recites that "by virtue of assignment dated August 27, 1866, the right for the state of New York was vested in Clinton A. Lombard and John Thompson;" and that by virtue of the assignment from

them of April 29, 1868, "the right for the state of New York" was vested in Russell, Reese, and Strong & Woodbury, and then it conveys all the "right, title, and interest" of Reese in the invention, as secured to him by the patent, for, to, and in the state of New York. The conveyance of December 10, 1869, from Strong & Woodbury to the defendants, recites that by virtue of assignment from Hamilton, of August 27, 1866, "the right for the state of New York" was vested in Lombard & Thompson; and that by virtue of the assignment from them of April 29, 1868, "the right for the state of New York" was vested in Russell, Reese, Strong & Woodbury; and that by virtue of the assignment from Reese, of July 15, 1868, "all his right, title, and interest in and to said right for the state of New York" was vested in Russell, Strong & Woodbury; and then it conveys all "our right, title, and interest therein, as secured by the letters patent and assignment before mentioned, which consists of the right, title, and interest" of Russell, Strong & Woodbury "to the right for the whole state of New York, except one-half interest held by Robert P. Russell and the counties of Cayuga and Franklin, previously assigned to John Busley and Sidney A. Paddock, respectively."

The conveyance of April 29, 1868, from Lombard & Thompson, conveys only their "right, title, and interest" in the invention. The conveyance from Reese conveys only his "right, title, and interest" in the invention. The conveyance from Strong & Woodbury conveys only their "right, title, and interest." No recitals in those instruments caused them to operate to convey to the defendants anything more than the right, title, and interest of Lombard & Thompson, whatever it was, on the twenty-ninth of April, 1868. It is true that the conveyance of April 29, 1868, and the subsequent conveyances, recite that what was vested in Lombard & Thompson, by the assignment to them, was "the right for the state of New York." But Milton A. Hamilton was no party to those conveyances. He did not deal with any one but Lombard & Thompson. Even if they be regarded as acting as his agents in subsequently conveying, they conveyed only their "right,

title, and interest." What that was has been defined. The parties taking from and under them were, by the form of the conveyance from them, referred to Hamilton to ascertain what, in fact, the "right, title, and interest" of Lombard & Thompson was. What it was depended on the three instruments of August 27, 1866, taken together, and an inquiry of Hamilton would have disclosed that fact. There was enough, in the terms "right, title, and interest," in the assignment from Lombard & Thompson, to put any purchaser from them, immediate or subsequent, on inquiry; and to charge him with notice of what such inquiry, if made of their grantor, would have disclosed. While by the recorded assignment of August 27, 1866, the right to make may appear to have been invested in Lombard & Thompson, yet they did not undertake to convey what that assignment appeared to convey, but only their "right, title, and interest" as it in fact existed. The case, therefore, does not fall within the principle of the two cases cited for the defendants. In this case no one made any inquiry of any person but Lombard & Thompson. Neither Hamilton nor the plaintiff are bound by any suppression of the truth by them, or any failure on their part to disclose all three of the instruments, so long as they assumed to convey only their "right, title, and interest."

It follows that the prayer of the petition must be denied.

WHITMUN v. SEAMAN and another.

(Circuit Court, S. D. New York. ———, 1880.)

1. PATENT No. 150,921, for an improvement in coal-scuttles, *held not infringed*.

In Equity.

WHEELER, D. J. This suit is brought for an alleged infringement of letters patent No. 150,921, dated May 12, 1874, granted to the orator for an improvement in coal-scuttles. As the orator is not the inventor of coal-scuttles, nor

of anything underlying the whole structure, his patent cannot be construed as covering the whole, but must be restricted to the particular construction invented by him in order to stand at all. *Railway Co. v. Sayles*, 97 U. S. 554. His scuttle is made with a bottom stamped out of one piece of metal, extending upwards outside of the body. The defendant's scuttle is made in substantially the same way, except that the bottom extends upwards inside of the body. Placing the body inside of the upward extension of the bottom is an important and distinctive feature in the plaintiff's invention, and is made so by his patent. Without that, a scuttle cannot be said to be his style of scuttle. He rivets the body to the bottom, and the bottom to the base, and that mode of fastening them is described in his patent. Had that been new his patent would probably have covered it, as well as the method of putting the parts together to form the scuttle. But that is an old and well-known way of fastening parts of metallic vessels together, and could not be patented to any one. His patent seems to stand well enough for his particular style of scuttle fastened in that manner, and that is all. The defendants do not make that style, and therefore do not infringe.

The bill is dismissed, with costs.

CLARKE, Trustee, v. JOHNSON.

(Circuit Court, E. D. New York. November 17, 1880.)

1. RE-ISSUE No. 3,579, issued August 3, 1879, to Nathaniel Jenkins, for a certain form of disc used for valve seats in steam joints, *held not infringed*.
2. EQUIVALENTS.—One substance does not constitute the equivalent of the other, when each produces a different product under the same conditions.

In Equity. Decision on final hearing.

Thomas William Clarke, for complainant.

B. F. Lee and Gilbert & Cameron, for defendant.

BENEDICT, D. J. This is an action for an account, and an injunction to restrain the defendant from making a certain form of disc used for valve seats in steam joints, upon the ground that such manufacture infringes a patent issued to Nathaniel Jenkins, August 3, 1869, known as re-issue No. 3,579, and now owned by the plaintiff.

Various issues are raised by the pleadings, of which it will be necessary on this occasion only to consider the one relating to the infringement.

The character of the article complained of is not in dispute. It consists of discs intended to be used as valve seats for steam joints, composed of bone black, mixed with gutta percha and India rubber, made vulcanizable by an admixture of sulphur, and then vulcanized; the proportions of the compound being either Para rubber, 10 lbs.; gutta percha, 5 lbs.; sulphur, $4\frac{1}{2}$ lbs.; bone black, $22\frac{1}{2}$ lbs. Or, Para rubber, 14 lbs.; gutta percha, 7 lbs.; sulphur, 6 lbs.; bone black, 28 lbs.

The main question of the case, as I view it, is whether such an article is covered by the Jenkins patent.

The Jenkins patent was construed by this court on a former occasion, (16 Blatchf. C. C. R. 495,) and no reason is seen for any modification of the opinion then expressed, that it is not possible, in view of the language of the specifications, to uphold the plaintiff's contention that the Jenkins patent is for a packing composed of four-tenths of refractory material, vulcanized, no matter what the vulcanized material may be, if it contained rubber; and that the patent must be considered to be limited to a compound consisting of at least four-tenths of refractory, earthy, or stony matter, mixed with rubber prepared for vulcanization by using less than 25 per cent. of sulphur and then vulcanized, whence results a material composed of 40 per cent. and over of refractory matter held together by a skeleton of soft rubber. So understanding the patent, I am at loss to discover any ground upon which to base the conclusion that the patent is infringed by a packing which consists of refractory matter held together by a skeleton of vulcanite.

Evidence has been given at this hearing to show that at the time of Jenkins' invention it was well known that both soft rubber and vulcanite became soft about the temperature of steam heat. And from this fact it has been argued that inasmuch as the packings in question were intended to be used at the temperature of steam heat, the employment of vulcanite instead of soft rubber, as the skeleton of the packing, was simply the use of a known equivalent in place of the soft rubber which forms the skeleton of the Jenkins packing. But such a conclusion by no means follows from the fact proved, when it also appears that a packing, the skeleton of which is vulcanite instead of soft rubber, when used at the temperature of steam heat, displays properties not possessed by a packing, the skeleton of which is soft rubber.

The testimony clearly shows that at the temperature at which these packings were intended to be used, the Johnson packing does not lose its toughness or close grain; does not flake or crumble, as the Jenkins packing does; resists pressure and the action of steam in a manner that the Jenkins packing does not; is more durable and far more efficient than the Jenkins packing. This difference in the action of the two packings, when used at the temperature for which they are intended, shows that the employment of the vulcanite in place of the soft rubber, is not the substitution of one substance for another without change of results, but that, on the contrary, a different product is obtained. Such a state of facts leaves no room to contend that the Johnson packing is obtained by simply employing a known equivalent in place of the soft rubber which forms the skeleton of the Jenkins packing.

The evidence also contains expressions of an opinion entertained by some persons of experience that all the sulphur in excess of about 2 per cent., used in the vulcanization of rubber, is simply mechanically mixed with and not chemically combined with the gum. And, from the evidence, it has been argued that vulcanite is soft rubber, or, as it is expressed, vulcanite is soft rubber *plus* mechanical sulphur; and consequently the Johnson compound does not differ in substance

from the Jenkins compound. But, as has been seen, the Johnson packing possesses properties not displayed by the Jenkins packing. A substantial change in the character of the article is produced by using a proportion of sulphur not contemplated by Jenkins; indeed, excluded from his invention by the terms of his patent. Whether excess of sulphur be mechanically mixed or chemically combined with the same can make no difference, for the fact remains that the result is a product possessing new and valuable qualities.

In view of the circumstances that the patent here sued on has been sustained on two occasions by distinguished judges, it is proper to add that the question presented by this case is one entirely different from that raised in the two prior cases set up in the bill. The valve seats complained of in the case decided by Judge Shepley March 22, 1872, (1 O. G. 359,) were claimed to have been made under the Frink patent. They contained lead or litharge and brass filings, which are sulphur absorbents; and it was there proved that these absorbents combined with the sulphur in vulcanizing, and so made another comparatively refractory ingredient, sulphureted metal. Upon this proof it was held that the valve seats then in question were substantially the same article as the Jenkins valves.

In *Jenkins v. Johnson*, 9 Blatchf. C. C. R. 516, the valve seats brought to the consideration of Judge Blatchford were a still different article, and in that case it was shown that the composition contained oxides of lead and iron, and that the excess of sulphur, beyond the amount taken up by the process of vulcanization to form a soft-rubber skeleton, united with the iron and lead, and formed refractory mineral matter. Consequently, it was in that case concluded that the Jenkins patent had been infringed.

Here the facts are different. The defendant's compound contains no sulphureted metal. There are no oxides of lead or iron, nor any other substance which combines with the sulphur to make refractory matter; but the excess of sulphur used, which by itself certainly is not refractory, is in such proportion that when the compound is submitted to a vulcan-

izing heat there results from the sulphur and the gum the substance called vulcanite. Accordingly, it has not been claimed in this case that the excess of sulphur employed in the manufacture of the defendant's discs goes to make refractory matter, as was found to be the fact in the two cases referred to. Here the contention has been that the excess of sulphur used is a mere adulterant; but, as already stated, this position is not supported by the evidence.

For these reasons, it must be held that the plaintiff has failed to prove infringement, and the bill is dismissed, with costs.

ADAIR v. THAYER.

(Circuit Court, S. D. New York. ———, 1880.

1. INFRINGEMENT—PART OF COMBINATION.—The appropriation of part of a patented combination constitutes an infringement *pro tanto*, if such part, separate from the rest, was new and patentable to the inventor.

Lister v. Leather, 8 Ell. & B. 1004.

Sellers v. Dickinson, 5 Exch. 312.

In Equity.

Andrew J. Todd, for complainant.

John Van Santvoord and *John S. Washburn*, for defendant.

WHEELER, D. J. This suit is founded upon re-issued letters patent No. 6,964, dated February 29, 1876, granted to the orator for an improvement in pumps. Before his invention single-acting pumps, cast in one piece, with open water heads, through which the piston and valves could be withdrawn and replaced readily, had been constructed; but all double-acting pumps, so far as has been shown, had been made in detached portions, were complicated, and their parts difficult of access. He devised a double-acting pump, with a piston cylinder and an open cylinder beside it for the valves below the piston, both below an open water head, through which the piston and those valves could be readily removed

and replaced; and with another short cylinder beside and opening into the upper part of the piston cylinder, for one of the valves above the piston, and a floating top to the piston cylinder, constituting the other valve above the piston, all the stationary parts of which could be cast in one piece, and all the moving parts of which would, when once in operation, be covered with and made air-tight by the water. The patent was intended to cover these improvements. The specification commences by stating that the invention consists in improvements in double-acting pumps, and describes the parts constituting the pumps as improved, their objects and modes of operation. There are five claims, the second of which only is claimed to be infringed, and that is for the "combination of the piston cylinder, the valve chamber and its valves, by which the water is supplied to and discharged from the lower side of the piston, the water head, and a cylinder cover, which is removable from the pump through the open water head, substantially as described." There cannot be a double-acting pump without two sets of valves—one below the piston, through which the water is drawn when the piston ascends, and another above the piston, through which the water is drawn when the piston descends. Only one pair, the one below the piston, is specifically mentioned in that claim. That pair, with the other parts specifically mentioned in the claim, and without the pair above the piston, not mentioned, would constitute a single-acting pump only. For such a pump the claim could not be maintained, because of lack of novelty; and as a claim for such a pump it clearly would not be infringed by the pump of the defendant. The defendant argues and insists that, as the inventor separated his claim into parts, each part must stand by itself, and be held to cover only devices mentioned in it. If this construction should be adopted, the patent, so far as this case is concerned, would be defeated. The patent is a grant, and is to be fairly and liberally construed, in favor of the grantee, to effectuate the intention of the parties to it. This is the settled doctrine in this country. Construing according to this rule, the whole subject of the patent is to be looked at.

It is for an improvement in double-acting pumps, and has no reference to single-acting pumps. The claim must be read as if it said, for the combination, in a double-acting pump, such as had been described, of the parts mentioned. This saves the patent, and saves the claim as a claim for the combination of the parts mentioned in such a pump. There they work together, and are not a mere aggregation. The defendant sells a pump which has an open cylinder beside the piston cylinder, for the valves below the piston, both of which are below an open water head, through which the piston and these valves can be readily withdrawn and replaced; and another cylinder, beside the piston cylinder, for the valves above the piston, opening into the water head, extends over it, with a fixed cover to the piston cylinder, so that the valves above the piston can be worked; all the stationary parts of which are cast in one piece, and all the moving parts of which are, when in operation, under the water, and made air-tight by the water, and constituting a double-acting pump. Here are all the elements of the combination described in the second claim of the patent, each doing the same thing in the same way as described in the corresponding parts of the specification, except the cylinder cover of the piston cylinder. As to that, in the orator's pump, it operates during the down stroke of the piston, as a cover for that cylinder, without which the valves above the piston could not work at all; and, in the defendant's pump, it does precisely the same thing, during the corresponding movement, without which the valves above the piston could not work there at all. In the orator's pump it can be hauled up with the piston, through the open water head, as far as the fastenings about the piston-rod above the pump will permit. In the defendant's pump it is fastened down to its place by braces from the supports of the piston-rod above the pump, but is readily removable by removing those braces, and removable through the open water head. To free it wholly from the rest of the pump, the fastenings of the piston-rod, above the pump, must be removed in each case; so that element of the combination performs one office in the

defendant's pump in the same manner as in the orator's, and in the manner assigned to it in that claim. That part of the orator's invention has been appropriated to the construction of the defendant's pump. It is not necessary, in order to constitute infringement of a combination patented as such, that the whole combination should be used. If a part of it only, that, separate from the rest, was new and patentable to the inventor, is used, taking that part is an infringement *pro tanto*. *Lister v. Leather*, 8 Ell. & B. 1004; *Sellers v. Dickinson*, 5 W. H. & G. Exch. 311, 312. Here the whole of this part of the patented invention is taken for one purpose, but not for all. It is none the less taken, however, and the taking is none the less an infringement because it is not taken for all purposes.

The defendant's pump is, probably, in some respects, an improvement upon the orator's, but that is no excuse for taking that part which the orator invented, and is not claimed to be. It is said that, as double-acting pumps were well known before, the orator could only have a patent for his particular form, and that the defendant's pump is of different form, and does not infringe. *Railway Co. v. Sayles*, 97 U. S. 554. And the statements of Mr. Justice Bradley, in the opinion of the court, are cited in support of that argument. Those statements are very applicable to cases like this. It is to be noticed that each inventor is there said to be entitled to his own specific form only so long as it differs from those of his competitors, and does not include theirs. Here the defendant has included a part of the orator's specific form of double-acting pump, and cannot shield himself from being adjudged an infringer to that extent.

Let there be a decree for an injunction and an account, according to the prayer of the bill, with costs.

THE STEBBINS HYDRAULIC ELEVATOR MANUF'G Co. and
another v. STEBBINS.

(Circuit Court, S. D. New York. ———, 1880.)

1. PATENT No. 132,111, issued October 8, 1872, for "improvements in hydraulic elevators," *held*, under the circumstances of this case, *not infringed* by an apparatus constructed according to patent No. 172,896, issued February 1, 1876, or patent No. 181,113, issued August 15, 1876, for "improvements in hydraulic elevators."
2. PATENT No. 132,112, issued October 8, 1872, for "improvements in safety devices for hydraulic elevators," *held infringed*.
3. PATENTS Nos. 172,896 AND 181,113, *held*, not improvements in or of, or in aid of, any of the inventions or improvements patented by patents Nos. 132,111 and 132,112.

Arthur V. Briesen, for plaintiffs.

George W. Wingate and Francis Forbes, for defendant.

BLATCHFORD, C. J. Letters patent No. 132,111 were issued to the defendant, October 8, 1872, for "improvements in hydraulic elevators." Letters patent No. 132,112 were issued to him on the same day for "improvements in safety devices for hydraulic elevators." On the fourth of November, 1872, he and two other persons, being then the owners of said patents, assigned, by an instrument in writing, the said two patents to "The Stebbins Hydraulic Elevator Machine Manufacturing Company," a California corporation. One of the plaintiffs, "The Stebbins Hydraulic Elevator Manufacturing Company," is alleged in the bill to be a California corporation, and the said assignment is alleged in the bill to have been made to it. The answer appears to admit that such assignment was made to the plaintiff corporation, and no point is made that it was not, or that it was made to another corporation. But there is no explanation as to the discrepancy of name by the introduction of the word "machine" into the name in the assignment. The parties, however, seem to treat the corporation assignee as being the corporation plaintiff.

The assignment, after assigning to the assignee all the

right, title, and interest of the assignors in and to the said two patents, proceeds thus: "Together with the right to modifications, improvements, or re-issues thereof, and all other and similar patents in the United States which may be issued to us or any one of us, directly or indirectly, in aid of the improvements above specified. * * * And we do hereby covenant and agree to and with the said Stebbins Hydraulic Elevator Machine Manufacturing Company, each for himself and not one for the other, to make, execute, and deliver to it, the said Stebbins Hydraulic Elevator Machine Manufacturing Company, such other and further assurances, deeds, and transfers as may be necessary or proper for the more effectual accomplishment of the true intent and purpose of these presents." On the first of February, 1876, letters patent No. 172,896 were issued to the defendant for "improvements in hydraulic elevators," and on the fifteenth of August, 1876, letters patent No. 181,113 were issued to him for "improvements in hydraulic elevators."

This suit is brought to recover for infringements of patents Nos. 132,111 and 132,112, and to compel the defendant to execute to the plaintiff corporation an assignment of patents Nos. 172,896 and 181,113. The specification of No. 132,111 says: "My invention relates to improvements in that class of hydraulic elevators which are used for elevating persons and things from one floor of a building to another. My improvement consists of an arrangement whereby the power of either one or two upright cylinders can be employed for elevating the load according to the weight which it is desired to lift. Heretofore, when two cylinders have been used for this purpose, the arrangement has been such that the pressure in both cylinders was applied in all cases, whereas, frequently and in most cases, the power of a single cylinder is sufficient, thus causing a waste of water, which, especially in cities where water is paid for by the gallon, is a heavy and unnecessary expense. In the following description my invention is fully described, reference being had to the accompanying drawing forming a part of this specification, in which figure 1 is a

front elevation of my machine, and figure 2 is a side elevation. A A represents two upright cylinders, which are secured to the same bed piece, B, at a short distance apart, or any number of such cylinders can be used. Inside of these cylinders is a piston, C, and each of the pistons has a bar, *d*, extending upwards from its center in the manner of a piston-rod. These bars have each a rib, *f*, extending the entire length along the middle of one side, as shown, while their opposite pieces are framed into a rack. A strong metal side piece, *e*, is secured to the outside of each of the cylinders, A, at their upper ends, so as to project above them. A shaft, *g*, extends across above the cylinders back of the piston bars, *d*, and bears in these side pieces. A spool, *h*, is secured upon this shaft opposite the rib, *f*, of each bar, in which the ribs fit, so that they form guides for the bar, *d*. A shaft, *I*, passes across above the cylinders on the opposite side of the bars, *d*, and also bears in the side pieces, *e*. Opposite each of the rack bars, *d*, a broad spur wheel, *j*, is secured to the shaft, *I*, so as to engage with the teeth on the vertical bars; and between the two broad wheels, *j*, a large spur-wheel, K, is fixed to the shaft. Thus, when the rack bars, *d*, are raised, the wheels, *j* and K, on the shaft, *I*, are revolved by the engagement of the rack. Below the wheels, K, a shaft, *l*, passes across parallel with the shaft, *I*, and bearing in the lower end of the side pieces, *e*. This shaft has at its middle a pinion, *m*, which engages with the wheel, K, and at its extremity a large driving pulley is secured, marked *n*, around which the belt for the elevator or car passes. By this arrangement the cylinders, A A, can be made quite short, so that they can be placed in a cellar or other small compartment, as the speed of the driving pulley can be multiplied at pleasure, and thus obtain a large amount of elevation for a short stroke of the piston bar. Either one or both of the rack bars can be used to transmit the power to the gearing. The water which lifts the pistons, C, and rack bar, *d*, is introduced into the cylinders through branch pipes, which are secured in the holes, *o*, in the bed piece. These pipes are so arranged that the water can be turned into either one or

both cylinders as required. By this means the ordinary work of the elevator can be accomplished by one of the cylinders, and when an extraordinary pressure is required both cylinders can be employed, thus providing an elevator that will answer in any place and do its work with great economy of water." The claims of this patent are two, as follows: "*First*, the upright cylinders, A A, with their piston, C C, each of said pistons being provided with an upright and rack bar, *d*, in combination with the shaft, I, with its spur-wheels, *j j* and K, shaft, *l*, with its pinion, *m*, and driving pulley, N, whereby I am enabled to employ the pressure in either one or both cylinders for hoisting purposes, substantially as and for the purpose above described; *second*, the upright rack bars, *d*, provided with the rib in combination with the guide spools, *h*, substantially as and for the purpose above described."

The answer of the defendant admits that he has made and sold hydraulic elevators constructed according to the description in said patent No. 172,896. According to the testimony of defendant's expert, Mr. Eliot, patent No. 172,896 describes an arrangement of two working cylinders provided with suitable pistons, one of the cylinders and pistons being placed inside of the other in such a manner as to economize room, and at the same time allow both of the pistons to be combined with a cross-head, which carries sheaves over which the lifting ropes of the elevator work; the combination and arrangement being such that one of the pistons, with its corresponding cylinder, can be brought into immediate action to assist the lifting force of the other at the pleasure of the operator or attendant of the elevator. The same expert states that the peculiar means by which such a result is accomplished consists in making the main working piston in the form of a cylinder, and connecting its upper end immediately with the cross-head that carries the sheaves, and also in connecting with the said cross-head a piston which works in an interior cylinder placed concentric with the outer working piston, and connecting with them a valve in such a manner that when the water pressure is brought to bear upon the

main working piston the pressure of water will also flow into the assisting cylinder, so as to fill up the space underneath the assisting working piston, which is directly connected with the cross-head; that said assisting piston and its cylinder are provided with a second piston, and so arranged relatively to the water pressure that whenever the attendant of the machine desires an extra amount of force to lift the load, he opens a valve to admit the water pressure underneath said second piston, and its force is thereby immediately applied upon or against the assisting piston; and that these two cylinders and their pistons are combined by means of a cross-head. The same expert says that the invention set forth in patent No. 132,111 and that set forth in patent No. 172,896 resemble each other only in the fact of having two cylinders so arranged in a hydraulic elevator as to be capable of assisting each other in lifting the load, according to the pleasure of the operator or attendant of the machine; that in so far as relates to the arrangement of the cylinders and the means of combining them together, they are, in his opinion, entirely different in their construction and mode of operation; that the arrangement of the cylinders as shown in patent No. 132,111 consists simply in placing one beside the other in a line, so that their pistons may be connected with a line of shafting, the only means of their combination being the shaft which carries the pinions which gear into the racks of the several cylinders in the combination; that in patent No. 172,896 the arrangement is such that only two pistons, with their corresponding cylinders, can be connected so as to assist each other, one of them being placed inside of the other, thereby arranging them so that the two may be connected directly with the cross-head which carries the sheaves over which the lifting ropes work, there being no racks or pinions or gearing of any kind between the two pistons which are intended to assist each other, but both of said pistons being connected directly with the same piece of mechanism; that the combination and arrangement in patent No. 172,896 could not be substituted to operate in combination with the device described

in patent No. 132,111, nor could the devices in patent No. 132,111, for combining the two cylinders, be substituted so as to combine the two cylinders, or pistons, as shown and described in patent No. 172,896; and that for these reasons he regards the inventions set forth in the two patents as entirely different in their construction and mode of operation in every respect, except the mere fact of their having two cylinders, and their pistons, to assist each other in lifting the load. The plaintiff's expert, Mr. McIntyre, says that the arrangement described in patent No. 172,896 is substantially like that shown in patent No. 132,111, in the main and particular features of construction and mode of operation, namely: the combination with the shaft or cross-head (or other device, as the case may be, for operating the cable) of the pistons of several cylinders, in such a manner that each of said pistons is always in direct and operative connection with the cross-head or device to be driven by the piston, and so that either one of the cylinders and pistons may be brought into use as a re-enforce to the other, after such other shall have partially raised the load to be elevated; that the machine shown in patent No. 172,896, while it involves the main feature and important principle of construction and mode of operation which is the subject of the machine in patent No. 132,111, is supplemented with the idea of such a combination and arrangement of the cylinders as that one shall be concentrically within another, and as that, whether one or the other be employed, or both at the same time, the power exerted through the connection of the piston with the shaft or other device to be driven will be transmitted centrally to the shaft to be moved, and in a more desirable manner than is accomplished by the construction shown in patent No. 132,111; and that the machine in patent No. 172,896 embraces an improvement on the machine shown in patent No. 132,111, in that the several pistons and piston-rods, which are always in operative connectin with the shaft or thing to be driven by them, are always so supplied with water, in contact with the pistons, that when the water pressure is applied to either pis-

ton, to re-enforce the other, the water so applied will not have to fill any empty portion of the cylinder beneath said piston before its motive power or pressure operates upon said piston.

There is no doubt that in patent No. 172,896, as well as in patent No. 132,111, the power of either one or two upright cylinders can be employed for elevating the load, according to the weight which it is desired to lift. But that is the purpose or object of the mechanical means employed in each. There is no claim in No. 132,111 to such purpose or object. If there were, such claim would be void. The first claim of patent No. 132,111 is a claim to a combination of the cylinders, pistons, rack bars, shafts, spur-wheels, another shaft, pinion, and driving pully, arranged substantially in the manner described in the patent. In patent No. 172,896 there are cylinders and pistons, but no others of the elements of the combination set forth in the first claim of patent No. 132,111; and such cylinders and pistons in patent No. 172,896 are combined and arranged, both among themselves and in reference to the other parts of the machine, in an entirely different manner, both as to construction and mode of operation, from the manner in which the cylinders and pistons in patent No. 132,111 are combined and arranged among themselves and in reference to the other parts of the machine. It is claimed for the plaintiff that the pully arrangement in patent No. 172,896 is the mechanical equivalent of the rack and pinion arrangement in patent No. 132,111. But it is quite apparent, from the evidence of Mr. McIntyre, that the mechanical equivalency consists only in the fact that in each patent each piston is always in operative connection with the device to be driven by the piston, so as to enable there-enforcing action to be effected. But the concentric arrangement in patent No. 172,896 for the central transmission of power, in connection with the mechanical arrangements which in that patent take the place of the rack and pinion arrangement in patent No. 132,111, make the arrangement of cylinders and pistons, and the attendant machinery, in patent No. 172,896, a different arrangement, mechanically, from the arrangement of

cylinders and pistons and the attendant machinery in patent No. 132,111, and not one embodying any invention claimed in patent No. 132,111.

The specification of patent No. 172,896 says: "In the drawings, A represents the outer casing or cylinder, provided with the inlets, *a a'*. On each side of the casing, A, is secured a suitable frame-work to sustain the pulleys, 1 1 and 2 2. From this frame-work rise the vertical guides, B B, for the cross-head, C. Within the cylinder, A, works the hollow piston, D, the upper portion of which is connected by suitable means to the cross-head, C. Again, within the hollow piston, D, is a stationary hollow cylinder, E, secured to the bottom of cylinder A. Thus the piston, D, moves and operates between the interior of the cylinder A and the exterior of the cylinder E, for purposes hereinafter explained. Again, within the cylinder E is fixed to operate the piston, F, having a hollow piston rod, *f*, reaching nearly to the top of the cylinder E. Again, within the hollow piston-rod or cylinder, *f*, is singly fitted and operated the piston, G. This hollow rod or cylinder, *f*, is provided with a valve, *g*, at its bottom for a purpose hereinafter explained. Attached to the piston, G, is the piston-rod, I, the opposite or upper end of which is connected with the cross-head, C, by any suitable means. Through the base of the casing or cylinder, A, I arrange the inlet openings, *a a'*, for the passage of the water from the connecting pipes. The opening, *a*, enters the cylinder, A, immediately under the piston, D, and supplies the water for raising that piston. The opening, *a'*, enters the cylinder, A', immediately under the piston, F, and supplies the water for raising that piston. The pipes conducting the water to the openings, *a* and *a'*, may be supplied with discharge cocks of any of the well-known styles.

"The operation of my device is as follows: The elevator being ready to ascend, water is admitted through the opening, *a*, and the pressure raises the piston, D, and with it the piston-rod, I, both being connected with the cross-head, C; the result will be the equal ascent of the pistons, D and G.

As the piston, G, rises in the hollow rod or cylinder, *f*, the dead-water resting in the pipe below the cock enters through the valve, *g*, and opening, *g'*, into and fills the cylinder, *f*. Let us suppose the elevator has reached the third floor of the building and some additional weight is added to the load, and the main piston, D, is unable to rise further, water is admitted through the opening, *a'*, and under the piston, F. This piston then rises, and as the valve, *g*, closes and prevents the escape of the water from under the piston, G, the piston, F, carries with it the piston, G, and piston rod, I, and an additional power is thus added to the piston, D, to aid in raising the elevator. By this construction it is evident that I am able to bring the auxiliary piston, F, into immediate action when needed. It remains in position to receive the hydraulic pressure, while the piston, G, and rod, I, move up with the piston, D, and, practically, become an elongated rod to the piston, F, ready to catch the pressure and come to the aid of piston, D, whenever additional aid is required."

An examination of this specification in connection with the specification in patent No. 132,111 shows that the views of the defendant's expert must prevail over those of the plaintiff's expert, and that the doctrine of mechanical equivalents cannot be successfully invoked in this case in favor of the plaintiff. The specification of patent No. 132,111 admits that two cylinders had before been used to elevate the load, and that the pressure in both cylinders was applied in all cases. Of course both cylinders were always in operative connection with the device to be driven by the pistons. The only new idea in common in patent No. 132,111 and patent No. 172,896, is the idea of employing the power of either one or two cylinders so as to economize water. One patent does it by one mode of construction and operation, and the other by another, cylinders and pistons in hydraulic elevators being old, to the extent just indicated.

It is not alleged that the defendant has infringed the second claim of patent No. 132,111, and it follows from the foregoing considerations that he has not infringed the first claim of

that patent. The defendant has constructed two elevators made substantially in accordance with patent No. 181,113. The defendant's expert, Mr. Eliot, testifies that he regards a machine constructed according to patent No. 181,113 as being substantially different in its construction and mode of operation from a machine constructed according to patent No. 132,111; that the peculiarity of a machine constructed according to patent No. 181,113 consists in using the water in a cylinder, combined with the working cylinder, in such a manner that the pressure of the water in said cylinder shall serve to always equalize the constant weight of the car or cage and its attachments, whatever they may be; that under such a construction no additional power is added beyond what is required as a mere counterbalance, and said counterbalance is a constant quantity in weight, and its method of application is for precisely the same purpose as when weights are ordinarily added to said cars or cages for the purpose of counterbalancing them; and that in a machine so organized there is but one working cylinder used, in the sense in which that term is used as applied to machines; that is, furnishing a power adapted to the load to be lifted. There is nothing in the testimony of the plaintiff's expert, Mr. McIntyre, which establishes the contrary of the foregoing view, and the counsel for the plaintiff contends, in argument, that what is found in patent No. 172,896 is also found in patent No. 181,113, with the exception of the central valve which in patent No. 172,896 is found in the central piston. The considerations before stated as reasons why an apparatus constructed according to patent No. 172,896 does not infringe patent No. 132,111, go to show, in connection with the considerations set forth in the testimony of Mr. Eliot, just recited, as to patent No. 181,113, that an apparatus constructed according to patent No. 181,113 does not infringe patent No. 132,111.

The defendant testified that he put into each of the two elevators, which he made in accordance with patent No. 181,113, a safety brake like that shown in patent No. 132,112.

It is not shown by the defendant that he had any license or permission to do so. He has, therefore, infringed patent No. 132,112.

Conceding, for the purposes of this case, that the assignment of November 4, 1872, assigns the right to improvements to be subsequently invented or patented by the defendant, in or of, or in aid of, the inventions or improvements patented by patent No. 132,111 and patent No. 132,112, it is manifest that the reasons before set forth as showing that the inventions embraced in patent No. 172,896 and in patent No. 181,113 do not infringe patent No. 132,111, are equally cogent to show that such inventions are not improvements in, or of, or in aid of, any of the inventions or improvements patented by patent No. 132,111; and it is not contended that any of such inventions are improvements in, or of, or in aid of, any invention or improvement patented by patent No. 132,112.

A decision as to the proper interpretation and scope and effect of the assignment of November 4, 1872, is unnecessary. The plaintiff is not entitled to the relief it claims under said assignment, even under the interpretation of it contended for by the plaintiff. The plaintiff is entitled to the usual decree in respect of the infringement of patent No. 132,112. The question of costs is reserved for further hearing.

STEIGER v. HEIDELBERGER.

(*Circuit Court, S. D. New York. November 12, 1880.*)

1. INFRINGEMENT—EMPLOYE—COMMISSIONS—INJUNCTION.—*Held*, under the circumstances of this case, that an employee is liable to account for the commissions derived by him from the sale of infringing goods, and that he could be enjoined from making any further sales.
2. SAME—EMPLOYER AND EMPLOYEE—PLEA IN BAR.—*Held, further*, that a suit against the employer in another district, for such sales, could not be pleaded in bar to a suit against such employee for an account and injunction.

Francis Forbes, for plaintiff.

Furman Sheppard, for defendant.

BLATCHFORD, C. J. The bill in this case is filed for the infringement of a patent. It charges that the defendant has infringed by making, using, and selling the invention patented, which is an "improvement in show-cards for embroidery." The infringement is alleged to have been committed in this district and elsewhere in the United States. The bill prays for the payment of the profits made by the defendant from the infringement, and of the damages sustained by the plaintiff therefrom, and for an injunction against the defendant restraining him from making, using, or vending any show-cards containing said improvement.

The defendant has interposed a plea to the bill, and it has been set down for argument and argued. It sets forth that the defendant has been and is employed by the persons composing the firm of Loeb & Schoenfeld, which firm is engaged in business in Philadelphia, within the jurisdiction of the circuit court of the United States for the eastern district of Pennsylvania, such persons being resident at Philadelphia; that his business is to visit divers places and exhibit to buyers samples of the goods made by said firm, and solicit offers or orders for the purchase of such goods; that such orders or offers, when received by him, are transmitted by him to the said firm in Philadelphia; that said firm, in case the offers or orders are satisfactory to it as respects price, the solvency or pecuniary ability of the proposed buyers, the terms and conditions of the proposed purchase, and other particulars, accepts the same, makes the sale, supplies the goods, charges them to the proposed buyer, and renders to him directly a bill for the same; that the defendant in such case receives a commission on the amount of the sale; that if the order or offer is not satisfactory, it is declined by the firm and no sale is made, and the defendant receives no commissions; and that he has not in any other way made or sold show-cards for embroidery containing the patented invention.

The plea also sets forth (2) that before the bill in this suit

was filed the plaintiff filed a bill in said circuit court in Pennsylvania against the members of said firm, for an infringement of said patent by them, by making, using, and selling show-cards for embroidery alleged to contain said patented invention, and praying for a decree that they pay to him all profits realized from said infringement, and all damages sustained by him thereby, and for an injunction restraining them from making, using, or vending any show-cards containing said improvement; that the defendants in said suit were served with process therein, and appeared and answered said bill, setting up a defence; that said answer was replied to, and said suit is pending undetermined; that said bill is for the same subject-matter and things, and the same alleged grievances, as are set forth in the bill against this defendant, and in fact, legal effect, and intendment; prays a remedy and relief against and damages and profits for and on account of, among other things, the alleged acts of this defendant, as set forth in the present bill against him, and that said alleged acts of this defendant, as an employe of Loeb & Schoenfeld, are, in contemplation of law, deemed and taken to be, and are included within, and constitute a part of, the alleged wrongs and grievances sued for in said bill filed in Pennsylvania, and that the rights, relief, profits, and damages, if any, to which the plaintiff is entitled by reason thereof, constitute a portion of the subject-matter and of the claim of said bill against Loeb & Schoenfeld, and are recoverable thereunder; and that, therefore, this defendant pleads said former bill and answer as a bar to the present bill.

As to the first branch of the plea, or the first plea, whichever it may be, (no point being made or decided as to whether there are two pleas or only one, or, if two, as to the propriety of pleading two pleas without leave,) the plea must be overruled. The substance of it is that the defendant is not liable in this suit for what the plea sets forth as having been done by him. This is not so. The plea shows that the defendant has made a separate and independent profit to himself out of the sale of such goods as he has been instrumental in selling, by receiving a commission thereon, in which commission Loeb

& Schoenfeld have no interest; that his commission is dependent on the sales; that he has made the sales for the purpose of receiving the commission; and that he obtains the commission by making the sales. This is a distinct profit from any profits made by Loeb & Schoenfeld. The commission to this defendant would not be included in any profits to be accounted for by Loeb & Schoenfeld, and such commission is a direct profit to this defendant from the sale of the goods. Moreover, this defendant, although selling only under the circumstances set forth, is liable to be restrained in this court, by an injunction, from selling the infringing goods, and this suit is properly brought against him for that purpose. This court has obtained jurisdiction over his person. The plaintiff has a right to restrain the defendant, by injunction, from participating, in the way set forth, in such sales, although a bill will also lie against Loeb & Schoenfeld to restrain them from participating, in the way they do, in the same sales. *Maltby v. Boto*, 14 Blatchf. 53.

As to the second branch of the plea, or the second plea, it follows, from the foregoing observations, that the pendency of the suit in Pennsylvania against Loeb & Schoenfeld is no bar to this suit. This defendant is not a defendant in that suit, and no injunction therein could be issued against him by name; and, although an injunction therein against the defendants therein might reach them for the acts of this defendant as an employe of theirs, yet, although he is an employe of theirs, in one sense, in what he does, he is independent of them in the profit he makes by his commission on sales, although he may receive his commission through them out of the sale price, and it is proper that the plaintiff should have an independent injunction against him in this suit. Again, as before said, the bill in Pennsylvania would not make the defendants therein account for the commission received by this defendant. This, therefore, is not the case of another suit pending between the same parties in another jurisdiction for the same subject-matter.

The plea is overruled, with costs, and the defendant will be assigned to answer the bill.

BRENNAN v. STEAM-TUG ANNA P. DORR.

(District Court, W. D. Pennsylvania. November 17, 1880.)

1. ADMIRALTY JURISDICTION—SUIT *IN REM*.—In a suit *in rem* in admiralty, against a vessel, an actual seizure is necessary to confer upon the court jurisdiction over the vessel.
2. SUIT *IN REM*—PROCESS—RETURN OF MARSHAL.—To process issued in a suit *in rem* in admiralty, the marshal made return: "November 3, 1875, attached the steam-tug Anna P. Dorr, her tackle, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving November 5, 1875, a copy of this writ at residence of Capt. E. F. Christian on wife." *Held*, that the return did not import a seizure of the tug.

In Admiralty. *Sur* motion to set aside *alias* writ of attachment.

ACHESON, D. J. This case is now before the court upon a motion made on behalf of Patrick Brennan and L. B. Fortier, to set aside an *alias* writ of attachment for the arrest of the steam-tug Anna P. Dorr, which was allowed by this court upon the *ex parte* application of E. F. Christian and John Carse, supported by an affidavit, alleging that, pending proceedings in the cause, the vessel had been clandestinely taken "out of the custody and jurisdiction of this court" by said Brennan.

The facts of the case, as they now appear to the court, are as follows: On October 27, 1875, Patrick Brennan, an owner of the one-fourth of said tug, filed a libel *in rem* for her sale, and the division of the proceeds between himself and his co-owners, Christian & Carse. To the process which then issued the marshal made a return in these words: "November 3, 1875, attached the steam-tug Anna P. Dorr, her tackle, apparel, furniture, etc., by serving a copy of this writ, personally, on John Carse, part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Capt. E. F. Christian on wife."

Christian & Carse appeared to the suit, and on November 15, 1875, filed an answer denying "the diversity of

opinion and interest among the owners in relation to the employment and management" of the tug alleged in the libel, and praying the court to pronounce against the libel.

In the answer it is alleged "that said tug *now is*, and has been during the season of navigation of 1875, engaged in her usual employment in and about the port of Erie," etc. Again, it is alleged "that the said tug *is now*, and has been during the entire season of navigation, employed and run for the joint interest and profit of the owners," etc.

From the evidence now before the court it appears that the marshal did not arrest or take possession of the tug by virtue of said process. He was instructed by the libellant's proctors not to arrest her, but simply to serve a copy of the writ upon Christian & Carse, and these instructions he obeyed. At the time the libel was filed the tug was in the possession of Christian, and she remained in his possession as fully after the service of the writ as before; and down until May 12, 1877, the tug was run by Christian in and about the harbor of Erie, and upon the lake, in her ordinary business. During all this time no further step was taken in this suit.

On the night of May 12, 1877, the libellant, Brennan, having obtained possession of the tug, ran her out of the harbor of Erie and took her to Buffalo, New York; and there, on May 14, 1877, filed a libel *in rem*, in the United States district court for the northern district of New York, for the sale of the vessel and distribution of the proceeds among the owners. Thereupon process issued and the boat was seized by the marshal of said last-named district. No answer having been interposed, an interlocutory decree in that suit was entered, and a final decree for the sale of the tug was made on July 25, 1877. Subsequently, E. F. Christian moved that court for an order opening his default and permitting him to defend the action, and vacating the decree and subsequent proceedings, and for an order dismissing the suit, on the ground that, in consequence of a prior action pending, the court had no jurisdiction in the premises.

The exemplification of the record of the United States dis-

trict court for the northern district of New York, now before me, shows that at the hearing of that motion a copy of the record of this court in this case was produced, and affidavits on both sides submitted, showing that the tug had not been seized by the marshal of the western district of Pennsylvania, but was left in the possession of Christian, and the circumstances under which she was taken out of the harbor of Erie. On April 15, 1878, the court denied the motion of Christian, and subsequently the marshal of the northern district of New York, under his writ of *venditioni exponas*, sold the tug to L. B. Fortier for \$3,250.

The purchase money having been paid to the marshal, and by him paid into court, Christian & Carse, by Sprague, Gorham & Bacon, professing to act as their proctors, petitioned the court for an order distributing the funds; and, such order having been made, the above-named proctors, on July 16, 1878, received and receipted for the shares of Christian & Carse, in their name and behalf.

It is, however, alleged, by Christian & Carse, that this action on the part of Sprague, Gorham & Bacon was wholly unauthorized and never ratified by them; and they further allege that L. B. Fortier acted and conspired with Brennan in seizing and taking the tug from Erie to Buffalo, in contempt (as they suppose) of the process of this court. Whether or not these allegations are true, it is not necessary to consider in disposing of the present motion.

The United States district court for the northern district of New York having passed upon the question of jurisdiction, and its final decree standing unreversed and unappealed from, that decree would be recognized and acquiesced in by this court, even were I of opinion that its decision upon the question of jurisdiction was erroneous. But I do not entertain such opinion.

In *Miller v. United States*, 11 Wall. 294, it is said: "In revenue and admiralty cases a seizure is undoubtedly necessary to confer upon the court jurisdiction over the thing when the proceeding is *in rem*. In most of such cases the *res* is

movable personal property, capable of actual manucaption. Unless taken into actual possession by an officer of the court, it might be eloiigned before a decree of condemnation could be made, and thus the decree would be ineffectual. It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject."

In the present case it is certain that there was no actual seizure of the tug by the marshal under the original process issued out of this court. Acting in accordance with the express instructions of the libellant the marshal did not seize the tug, but, with the acquiescence of all the parties in interest, she remained in the possession of Christian. Of this, I may here say, none of the owners, under the circumstances of the case, have any right to complain.

But it is said that the marshal's return shows an attachment of the vessel. I do not think so. True, the language of the return is, "attached the steam-tug Anna P. Dorr." But how? "By serving a copy of this writ personally on John Carse, part owner of same, and by serving, November 5, 1875, a copy of this writ at residence of Captain E. F. Christian on wife." But such service of the writ was not an attachment or seizure of the vessel.

The return, as a whole, does not import any seizure of the tug, and it is entirely consistent with the facts as they appear *aliunde*.

It follows, from what has been said, that the order allowing the *alias* attachment in this case was erroneously made. Certainly that order would not have been made had the court been fully advised as to the facts, or had the proceedings in the United States district court for the northern district of New York been brought to its attention.

And now, November 17, 1880, the *alias* attachment is set aside; and it is ordered that the marshal deliver the said steam-tug Anna P. Dorr to L. B. Fortier; and it is further ordered and decreed that E. F. Christian and John Carse

pay the costs of said *alias writ*, and all subsequently-accruing costs, including the marshal's costs in connection with the seizure and custody of the boat; the same to be taxed by the clerk.

EHMAN and others v. STEAM-SHIP SWIFTSURE.

(District Court, D. Maryland. November 8, 1880.)

1. SALVAGE—TOWAGE.—Service rendered by a steamer, in the course of its regular pursuit, in towing and relieving a vessel, under circumstances of no unusual danger to life or property, and without the exercise of unusual activity, enterprise, or heroism, should not be regarded as meriting a reward out of all relation and proportion to what would have been accepted upon a contract contingent upon success.

The Birdie, 7 Blatchf. 243.

The H. B. Foster, 1 Abb. Adm. 235.

2. SAME—SAME.—In such case the allowance should be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam-vessels sufficiently powerful to make the assistance effective; but it should not be so large and so out of proportion to the services actually rendered as to cause vessels, in situations in which it was expedient that they should quickly accept such assistance, to hesitate or decline to receive it because of its ruinous cost.

In Admiralty. Libel for salvage.

Sebastian Brown and I. Nevett Steele, for libellants, cited: *The Ship Ewbank*, 1 Sumn. 400; *The Independence*, 2 Curtis, 357; *The Brig Dodge Healy*, 4 Washington, 651; *Tyson v. Prior*, 1 Gallison, 135; *The Emulous*, 1 Sumn. 207; *The Clyde*, 5 Ben. 98; *Sonderberg v. Tow-boat Co.* 3 Woods, 146; *The Ship Charles*, 1 Newb. 340; *The Chalmette*, 1 Woods, 399; *The City of Valparaiso*, 2 Lowell, 501; *The Amerique*, 6 L. R. Privy Council Appeals, 475.

John H. Thomas, for respondents, cited: *The M. B. Stetson*, 1 Lowell, 119; *The Jas. T. Abbott*, 2 Sprague, 101; *The I. F. Farlan*, 8 Blatchf. 207; *The Stratton Audley*, Id. 264; *The Underwriter*, 4 Blatchf. 94; *The Birdie*, 7 Blatchf. 239; *The*

Colon, Dt. Ct. S. D. of N. Y., opinion by Judge Choate, Aug. 14, 1878; same case in Ct. Ct., opinion by Judge Blatchford, July 9, 1880, *supra*, 469; *The Plainmiller*, 2 FED. REP. 872.

MORRIS, D. J. The British steamer *Swiftsure*, 1,920 tons, laden with a cargo of iron ore, on a voyage from the coast of Africa to Baltimore, went aground about 9 o'clock on the morning of May 9, 1880, in the waters of the Atlantic ocean, about three miles from the light-house on Smith's island, and about 10 miles from the entrance into the Chesapeake bay. The morning was pleasant, with a somewhat hazy atmosphere, and the sea was smooth, but the master of the steamer mistook the light-house on Smith's island for that on Cape Henry, and when his vessel touched the bottom supposed that he was on a bar, and kept her at full speed until he had forced her over a mile towards the shore, and until she rested firmly bedded in the sand. During the forenoon the sea was very smooth and the wind south-west, and the steamer lay solidly in the sand, and those in charge of her appear not to have been specially alarmed at her situation, and to have confidently hoped that she would float off without injury at high tide, which would be between 7 and 8 o'clock in the evening.

The steam-tug *R. T. Banks*, learning from the pilot-boat that the *Swiftsure* was aground, went to her about 11 o'clock, but finding the captain of the *Swiftsure* intoxicated, and the first officer not willing to employ him, the master of the tug concluded not to remain by her. The keeper of the life-saving station at Cape Charles, learning the steamer's situation, went out to her about 11 o'clock and boarded her. He found the captain intoxicated, and had an understanding with the mate that he should keep a lookout for them during the night, if they should have to remain, and that he should show a light on a favorable landing place on the shore should the steamer burn signals of distress. About midday the two steam-tugs *America* and *Rattler*, while cruising just outside of the capes of the Chesapeake bay looking for vessels coming from the sea to be towed in were informed by the pilot-boat

that the Swiftsure was aground on Smith's island. They at once proceeded to where she was lying, a distance of eight or ten miles, and they arrived along-side of her about 2 o'clock in the afternoon. These two tugs are among the most powerful on the Atlantic coast, and are well equipped for relieving stranded vessels. They offered assistance, and were invited on board of the steamer.

The wind, which had been south-west in the morning, was now south-east—that is to say, directly from the ocean—and the water, which in the morning had been very smooth, was now much rougher, so that the steamer, as the tide rose, was thumping more and more upon the bottom. Her officers were in consequence fearful that she might receive serious injury if the thumping continued, and when the tugs arrived were making some preparations looking to throwing overboard a portion of her cargo if the thumping should increase and the ship not get off as the tide rose. The officers of the steamer asked the captains of the tugs if they thought they could get the steamer off. They replied that they could, and were willing to try. They were then told that the sooner they got to work the better. The tugs made fast first one and then two hawsers to the stern of the steamer, and by using one tug to keep the other in position, as well as to assist in pulling, and with the aid of the powerful propeller of the steamer herself, they presently got the steamer so that she would move when lifted by the roll of the sea, and little by little they pulled her a mile or more, until she was in water where she would float. They were occupied in this service until about half-past 5 o'clock. When the steamer was fairly afloat, and in deep water, her captain declined further assistance from the tugs, and, obtaining a pilot, came in through the capes and up the bay to Baltimore. She was there examined by marine surveyors, and found not to be in any respect injured in hull or machinery, nor was her cargo damaged.

The value of the steamer was about \$110,000, and her cargo about \$15,000. She was 275 feet long, and had engines of v.4,no.5—30

180-horse power. She was a well-built iron steamer, launched in August, 1878. The value of the two tugs was between \$30,000 and \$40,000.

I think it clearly appears that the steamer, at the time the assistance was offered, was in peril, and that her officers so considered her. The wind and sea were increasing. That part of the coast is considered very dangerous, and liable to sudden storms. The tide there has a rise of four feet, and it would have been high tide between 7 and 8 o'clock; but it appears to me that it was almost a mere chance that the steamer would have been able to get off at high tide by her own power alone. She was not on a bar, but fully a mile in shore, and with shoal water all around her. The wind had a tendency to carry her further in, and the thumping was very likely to cause her to bilge and to put her machinery out of working order. I think there can be no doubt that it would have been culpable hardihood in her master to have refused the assistance offered by the tugs, and to have relied upon the chance of getting off at high water without their aid. The service of the tugs was, therefore, a salvage service, as distinguished from mere towage. It led to the rescue of the ship from danger, and should be remunerated as salvage.

It is to be considered, however, that the tugs, in rendering this service, were not going outside their usual occupation and use. They were both, when they started for the Swiftsure, outside of the capes, looking for employment. One of them had been so far out as to meet the Swiftsure as she was coming in from the sea early in the morning. They encountered no unusual risk either to life or property, and the officers and crew endured no unusual fatigue or labor, and neither men nor vessel met with any injury. There was ample depth of water all around the Swiftsure for the tugs to navigate, and the weather was not stormy nor threatening. So that, although the assistance was most timely and in the highest degree beneficial to the steamer, it was, so far as the tugs were concerned, hardly different from any other three hours of their daily employment. It is scarcely to be doubted

that if they had been solicited in the morning to undertake the service for a fixed price they would have agreed to remain, so long as the weather was such as in fact it continued to be, along-side the steamer, and work at her for their usual compensation per hour.

Norfolk was only 35 miles off, and in that port there were two wrecking companies, owning powerful steam-vessels, kept for the purpose of rendering assistance to disabled and wrecked vessels. Two of these, the *Resolute* and the *Rescue*, started to go to the *Swiftsure*, one of them at 4 o'clock in the afternoon and the other at 11 o'clock at night. So it appears that the *Swiftsure* was not lying where she would be likely to remain long without assistance if she had signalled for it, or had taken means to communicate with the shore. Although, therefore, this is a case of salvage, it is one of a low order of merit, and wanting in those features which chiefly have prompted generous allowance proportioned to the value of the property saved.

It has been held, and I think rightly, with regard to steamers whose regular pursuit is to tow and relieve vessels, and where connected with the service rendered there are no circumstances of unusual danger to life or property, and no unusual activity, enterprise, or heroism displayed in going out to render it, that such service should not be regarded as meriting a reward out of all relation and proportion to what would have been accepted upon a contract contingent upon success. *The Birdie*, 7 Blatchf. 243; *The H. B. Foster*, 1 Abb. Adm. 235.

The allowance in such cases is intended to be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam-vessels sufficiently powerful to make the assistance effective. It would be contrary to the spirit of the maritime law to reduce the salvage compensation below this standard of liberal inducement, and it would equally frustrate its purpose if the allowance should be so large and so out of proportion to the services actually ren-

dered as to cause vessels, in situations in which it was expedient that they should quickly accept assistance of the character rendered in this case, to hesitate or decline to receive it because of its ruinous cost. Endeavoring to keep clear of both the difficulties above indicated, and intending to practically apply the rules of the maritime law and the spirit of the precedents in our own courts of admiralty to which my attention has been called, I have concluded in this case to award to the salvors the sum of \$2,500.

With regard to the costs, although the claim of \$40,000 made by the libellants was extravagant, and may have operated oppressively upon the respondents, yet, under all the circumstances of this case, and as it is not shown that any tender or offer of any definite sum was ever made to the libellants, I am not inclined to vary the usual rule.

NOTE. See *P. P. M. & W. Co. v. The Steam-boat H. C. Yeager*, 1 FED. REP. 285; *Mayo v. Clark*, Id. 735; *Corwin v. The Barge Jonathan Chase*, 2 FED. REP. 268.

ATLAS STEAM-SHIP Co. (limited) v. STEAM-SHIP COLON.

(Circuit Court, S. D. New York. July 9, 1880.)

1. SALVAGE—MEASURE OF COMPENSATION.—It is the policy of the law to give a proper salvage remuneration to powerful and well-equipped steamers which render service in saving property that is in peril at sea; but the true character of the individual service must be looked at under the circumstances of each particular case. *Held*, under the circumstances of this case, that the salvage compensation awarded was adequate and liberal.

Everett P. Wheeler, for libellant.

Thomas E. Stillman, for claimant.

BLATCHFORD, C. J. The steam-ship Colon was one of a regular line of steamers, owned by the claimant, running between New York and Colon. She left New York on the seventeenth of August, 1876, bound for Colon, with 140 passengers, and a crew of 74 men, all told. She was a screw-steamer, built of iron, of 2,686 tons burden, full brig rigged, carrying two courses, two lower top-sails, two upper top-sails, two top-gallant sails, two spencers, forestay sail, main-stay sail, and jib. Her spread of canvas was about 2,200 yards. Her engines were compound engines. She intended to go by the way of the Crooked island passage. On the twentieth of August, about 11 o'clock in the forenoon, she broke her low-pressure crank-shaft in the crank. By the accident two men were killed, the four columns which supported the low-pressure and high-pressure cylinders were broken, and other parts of the machinery were badly damaged. The damage was such that it could not be repaired at sea, and the master decided to make for the port of New York under sail, the propeller being useless.

At the time of the accident the vessel was about in latitude 28 degrees 17 minutes north, and longitude 74 degrees west from Greenwich. She was distant about 731 miles from New York, and 200 miles from the nearest port, which was Nassau, New Providence. Savannah was distant 420 miles, and

Havana about the same distance. In any of those ports the engines could have been repaired. Anchorage could have been found at Watling's island, 248 miles distant, and at Little Bird rock, 326 miles distant. The Colon could have made any of those ports under sail. Aside from the breaking of her machinery, she was entirely stout, staunch, and seaworthy. About half an hour after the accident, the Colon was got under all sail, and her master attempted to wear; but, her propeller not being disconnected, he was unable to do so, and she made headway to the southward about a knot and a half an hour, and drifted to the eastward at about the same rate. The prevailing winds at that season of the year, and in the vicinity where she was, were more favorable for her to proceed to New York, or to some northern port, than to a West India port. It would probably have taken her fourteen days to reach New York under sail alone.

The master of the Colon was exceptionably competent, and had had a wide experience in steam-vessels. For 27 years he had navigated that part of the ocean through which the Colon's route lay. He had frequently tested the ability of the Colon to make headway under sail, and had found she was entirely manageable with the wind on her beam or abaft the beam. These tests were made while the screw was connected with the shaft. The screw of the Colon was attached to the shaft in such a manner that it could be disconnected in less than two hours, and, when disconnected, it would revolve freely and would not interfere with the steering of the vessel. With the screw disconnected the vessel could sail within six points of the wind. At the time of the accident the weather was pleasant and the sea smooth, and the wind light from west-south-west. The part of the ocean where the Colon lay disabled was much frequented by both steam and sail vessels. Steamers running to and fro between New York and Aspinwall passed in the immediate vicinity. So did steamers from the Spanish main, bound to Cadiz and ports in Spain and France. So did sailing vessels bound to and from New Orleans, Mobile, and Havana. The Colon had fresh

provisions and ice sufficient for four or five weeks, and salt provisions, among her stores, sufficient for five months. She carried also in her cargo large quantities of flour, salt meat, and preserved provisions. Her cargo was worth \$250,000, and none of it was of a perishable nature.

Shortly after the accident a French brig was boarded by the master of the Colon. The brig offered her services, but they were declined. She could have assisted the Colon in getting her head around to the northward, which the Colon was unable to do unassisted, with the wind as it was, and with her screw connected with the shaft. Owing to the accident to her machinery, it was not convenient for the Colon to detail men to disconnect the screw until the morning of the 22d. Towards 4 o'clock in the afternoon, and about five hours after the accident, the Colon sighted the steam-ship Etna, distant about 10 miles, and soon after hoisted the signal "B. N. D.," which signified that she wished to communicate close. The Etna changed her course and bore for the Colon, and reached her, and the master of the Colon put out a small boat and boarded the Etna. The Etna was an iron steamship of 1,274 tons burden, owned by the libellant, and running regularly between New York and West India ports. She had left Kingston, Jamaica, on the seventeenth of August, bound for New York, where she was due on August 24th, in the afternoon. She carried 39 passengers and a crew of 33 men, all told. Her cargo was worth about \$100,000, and a small portion of it consisted of fresh fruits. The Etna was worth about \$100,000. The master of the Colon had an interview with the master of the Etna on board of the Etna, and told him that the machinery of the Colon was disabled, and that he wished the Etna to tow him back to New York. After some negotiation it was agreed that the Etna would undertake the service. The subject of compensation was mentioned, and, at the suggestion of the master of the Colon, it was agreed that that should be left to be determined by the parties in interest in New York, and an agreement in writing was drawn up, and was signed by the two masters, as follows:

"At sea, August 20, 1876, lat. 28 deg. 17 min. N., long. 74 deg. W., on board steam-ship Etna. We, the undersigned, do hereby agree as follows: The P. M. S. S. Colon, being disabled as to her machinery, but in other respects tight, staunch, and strong, asks the Atlas S. S. Etna to tow her, the Colon, to New York. The undersigned, Captain S. P. Griffin, of the Colon, stipulates that compensation for the assistance to be rendered shall be settled by the companies in interest in New York; and the undersigned, Captain J. W. Sansom, of the Etna, accepts the stipulation of Captain S. P. Griffin, and for his part will render the assistance mentioned upon the terms stated.

"S. P. GRIFFIN,
"J. W. SANSOM."

The Etna had only one hawser suitable to assist in towing the Colon. It was a 10-inch hawser, which had been in use on the Etna for two years or more, but was in good condition. The Colon had a larger hawser, new, which had never been used. Before the captains separated it was arranged that both hawsers should be used in towing. This agreement having been made, the master of the Colon returned to his vessel, and the hawser of the Colon was passed to the Etna, and the hawser of the Etna to the Colon. The hawsers were made fast to the after bitts on the quarter-deck of the Etna, on either side, and the Etna resumed her voyage to New York with the Colon in tow. They got under way about 7 o'clock in the evening of the twentieth of August, and arrived off Sandy Hook shortly before midnight on the 25th, and came up the bay early in the morning of the 26th.

During all the time that the service was performed the weather was fine, the sea smooth, and the winds favorable, and during most of the time both vessels carried sail. The vessels arrived in New York safely and without accident, except that the Etna's hawser stranded on the twenty-first, and there was consequently a short stoppage while it was being repaired. In consequence of the inequality in the strength of the two hawsers, they were so arranged that that of the Colon bore more of the strain of towage than that of the Etna.

The Colon, on her arrival in New York, in her damaged condition, was worth about \$230,000. She had earned no freight. On the arrival of the steamers in New York, the president of the Pacific Mail Steam-ship Company, which owned the Colon, called on the agents of the Atlas Steam-ship Company, and asked them to fix a sum for the service rendered, as he desired to transfer the passengers and cargo of the Colon to the Crescent City. No agreement was made, and later in the day the agents of the Atlas Steam-ship Company wrote to said president (Mr. Clyde) that they wished to consider the matter, and that they would communicate with him definitely on Monday, August 28. The transhipment of the Colon's passengers and cargo to the Crescent City was immediately commenced, with notice thereof to the agents of the Etna.

On Monday the agents of the Atlas Company called upon Mr. Clyde and stated to him that they considered the services worth \$150,000, and that they would claim that amount. Mr. Clyde replied that he did not think the service was worth any such sum, but that he was willing to pay them fair compensation. There was no further negotiation, and on the following day the libel in this case was filed against the Colon and her cargo, claiming \$150,000. The greater portion of the cargo of the Colon was then on board of the Crescent City. Process was issued under the libel, and the Colon and the cargo were both attached. A stipulation for the value of the Colon and her cargo, in the sum of \$150,000, was given August 30th. The libel was filed by the Atlas Steam-ship Company, (limited,) for itself and all others. The master, officers, and crew filed petitions to be made co-libellants, and orders to that effect were entered. A salvage compensation of \$10,000 was awarded by the district court to the owners of the Etna and to her master and crew. Of this sum \$4,375 was awarded to the master and crew, and \$750 more to the master. These two sums, amounting to \$5,125, have been paid by the owners of the Colon. The cargo of the Etna was shipped under bills of lading which permitted the Etna to tow

and assist vessels in all situations. Certain consignees of cargo on the Etna, whose goods had been damaged by the detention, filed petitions and became co-libellants. The district court decreed that they should recover the damages sustained by them, and that the Colon should pay the same in addition to the award of \$10,000. The damages of these co-libellants were assessed, and, with the costs awarded to them, amounted to \$2,200.28, and that sum has been paid by the owners of the Colon. A reasonable allowance to the Etna for damage to her hawser is \$75; for repairs to her deck and engine, \$300; and for extra coal used, \$125. The wear and tear of the engine of the Etna depended on the pressure of steam carried and the number of revolutions made. The cargo of the Colon was shipped under bills of lading which exempted her from liability arising from disasters or dangers of steam navigation. The damage to her engine resulted from a latent defect in the crank-shaft, which could not have been discovered by examination prior to the breakage. None of the officers or crew of the Etna left their vessel at any time to render assistance to the Colon. None of the passengers or property on board of the Colon were transferred to the Etna. The towing voyage to New York was without danger or anxiety. The Colon was equipped with eight sail-boats, large enough for ocean service, which could have been sent, if necessary, to intercept steam vessels or to some port. The engineer's log of the Etna shows that there are entries in it as follows: "August 21st. Forward crank-pin and thrust heating." "August 22d. Still running water on the bearings." "August 28th. Bearings hard to keep cool." It was found that these entries were made nearly two years after the service was rendered and during the progress of the trial in the district court. The libellants endeavored, on the trial in the district court, to prove that they had sustained a loss of \$2,300 in freight on account of the detention of the Etna. This claim was abandoned after considerable testimony in regard to it had been taken. The libellants put forth on the trial in the district court exaggerated claims as to items of damage and

disbursements, and gave proof in regard to them, but afterwards abandoned such claims. The district court refused to allow costs to the owners of the Etna

On the foregoing facts my conclusions of law are that the compensation awarded by the district court to the owners of the Etna—\$4,875—was adequate and liberal; that costs in that court were properly refused to them; and that they should pay to the claimant its costs of this court.

The claim of the owners of the Etna, in their petition of appeal, is that they are entitled for the salvage service to not less than \$25,000, with costs, besides compensation for the actual losses and damage sustained by them in the service, and exclusive of any award to the master and crew of the Etna for their services. In other words, they claim that the \$500 should be increased to \$1,856.65, and the \$4,375 to \$25,000. This would make the entire amount paid and to be paid by the Colon \$34,181.93, besides costs, and it would make the relative compensation of the owner of the Etna and her ship's company as 4.87 to 1.

There is no appeal by the owners of the Etna from the ratio of distribution of the \$9,500. There is no allegation in the petition of appeal that the decree below is erroneous because it did not give to the owner of the Etna a larger proportion of the \$9,500 than \$4,375, and no allegation that the master and crew should not absolutely have had as much as \$5,125, or as much of the \$9,500 as \$5,125. The ratio of distribution adopted by the district court, if applied to a sum large enough to give to the owners of the Etna \$25,000 in place of \$4,375, would require that sum to be \$54,285.73, so as to give to the master \$4,285.73 instead of \$750, and to the master and crew \$25,000 instead of \$4,375; and, adding to this the \$1,856.65 and the \$2,200.28, would make a total of \$58,342.66, exclusive of costs. But the owners of the Etna really contend, on this appeal, that the compensation to them, relatively to the compensation of the ship's company, should be as 4.87 to 1.

Complaint is made that the ship's company receive \$750 more than the owners of the Etna; that the ship's company were in the employ of such owners and paid by it, and did little work as compared with the Etna, and little increased work; and that the substantial service was rendered by the steamer, and not by individual exertions. It is also said that the meager character of the award to the vessel will prevent owners of vessels from rendering salvage service; that the employes of the vessel are allowed to use the product of the investment of the capital of the ship-owner to benefit themselves; that if the decree below is allowed to stand as fixing a just measure of compensation to the ship-owner, ship-owners will instruct their masters to no longer attempt to save property in peril at sea; and that, in consequence of the decision below, this has already been done by one of the steam-ship lines from the port of New York. These are not commendable suggestions, and it is not to be supposed that other ship-owners will follow the example set in this case of making such unfounded and exaggerated claims as are made in the libel, culminating in a demand for \$150,000. If, on the real facts of this case as they appeared to the district court, and as they appear to this court, the consequences intimated shall be arranged for by those who threaten them, they will undoubtedly hesitate to carry them out, if from no other motive, from that of self-interest, lest they themselves may at some time be in the peril with their property to which they propose to abandon the property of others. The considerations suggested are of no force except to injure those who procure their advocates in court to put them forth, and can meet with no favor from disinterested and impartial persons.

It is, undoubtedly, the policy of the law, and it will be the aim of the court, to give a proper salvage remuneration to powerful and well-equipped steamers which render service in saving property that is in peril at sea. But the true character of the individual service must, under the circumstances of each particular case, be looked at. In the present case, the acts of the master of the Etna at the time show most dis-

tinently what he understood the exigency to be. The agreement signed voluntarily by him, and under no stress, pressure, or compulsion, shows his view of the situation of the Colon, and of the service required of the Etna. There is no claim that the situation was misrepresented to him, or was misunderstood by him. The Colon was disabled as to her machinery, but was in other respects tight, staunch, and strong, and needed no assistance but towage. The Etna towed her to the port to which the Etna was bound. For the time occupied in the towage the compensation of \$4,375 is at the rate of over \$33 an hour. The delay to the Etna was 36 hours.

It is speculation and conjecture to assume that disaster would have overtaken the Colon because of her location, or of her drifting, or of a change of weather, or of her being deprived of the use of her steam machinery, or of any shortness of provisions. Anything may happen, but there is no evidence on which to found a reasonable belief that disaster would have happened to the Colon or her cargo from any one of those causes.

The evidence does not show any serious risk to the Etna, with proper management of her machinery. It is to be assumed that her machinery was properly managed. She was not asked to improperly manage her machinery in towing, or to tow at too rapid a rate, with injury to the machinery, when the machinery could have been properly managed, and the towing could have been done at a less rapid rate without injury to the machinery. Improper use of the machinery, when it could as well have been properly used, is not to be laid to the account of the Colon. The evidence as to the actual results of the towing on the machinery of the Etna shows that the risk of breaking it down by the towing was very small. On the evidence the risk of the Etna exhausting her fuel was very small. As to the risk of the Etna's receiving nothing if her machinery had given out, or her coal been exhausted before reaching New York, it is clear that, as the service by the agreement was towage towards New York, the

Etna would have been entitled to compensation for such towage as she gave, if she had been compelled by either of the causes named to give up the towage, provided the Colon had reached New York safely. There is no reason to suppose she would not have reached New York safely.

The amount awarded by the district court for the service seems to be fully adequate, in view of the amounts awarded in the various cases cited on the part of the libellant as well as of the claimant, under the circumstances of those cases as compared with the circumstances of this case.

As to the distribution made by the district court, if \$10,000 is the proper total sum, as it is, the owners of the Etna can have no larger share of it (besides the \$500) than the \$4,375, as they do not appeal from the award to the master of \$750, and to the master and crew of \$4,375, and those sums have been paid. It was proper for the district court to refuse costs to the owners of the Etna because of the exorbitant and unfounded claims they brought forward, and the expense and trouble to which they wantonly subjected the claimant.

The owners of the Etna should have a decree for the same amount as in the district court, without the costs of that court, and should pay to the claimant the costs of this court.

LANDS v. A CARGO OF 227 TONS OF COAL.

(District Court, D. New Jersey. November 9, 1880.)

1. ADMIRALTY JURISDICTION—MOTION.—A court of admiralty will ordinarily refuse to decide a jurisdictional question upon a mere motion.
Cushing v. Laird, 4 Ben. 88.
Dennistoun v. Draper, 5 Blatchf. 336.
The Othello, 1 Ben. 43.
2. MONITION—INSUFFICIENT DESCRIPTION.—An objection that the monition did not sufficiently describe the property to be attached, is insufficient, where the marshal has not been thereby misled, and attached the wrong property.

3. ADMIRALTY JURISDICTION—MARITIME CONTRACTS.—Courts of admiralty have jurisdiction of all maritime contracts.
Steam-boat v. Phæbus, 11 Pet. 175.
4. MARITIME CONTRACT—CONTRACT OF AFFREIGHTMENT.—A contract for the transportation of freight or merchandise upon navigable waters is maritime in its character.
Canal-boat Walsh, 5 Ben. 73.
5. NAVIGABLE WATERS—JUDICIAL NOTICE.—The court will take judicial notice in such case that the waters on which the contract was performed were navigable, without any allegation of the fact in the libel.
The Apollon, 9 Wheat. 374.
The Steam-boat Jefferson, 10 Wheat. 428.
Peyroux v. Howard, 7 Pet. 342.

Libel in Rem.

J. A. Hyland, for libellant.

R. Wayne Parker, for claimant.

NIXON, D. J. This is a proceeding *in rem* against a cargo of 227 tons of coal, to recover for freight in transporting it in the libellant's boat, the *E. N. Brooke*, from Elizabethport to Newark, in this state, and for demurrage for the detention of the vessel in discharging the cargo. On the return of the monition the respondents filed two exceptions: (1) That the libel did not disclose a case of which the court had jurisdiction; (2) that the monitions did not sufficiently describe the property to be attached.

It is an answer to both to say that, with regard to the first exception, a jurisdictional question is raised, which a court of admiralty requires to be presented by the pleadings and proofs, and ordinarily refuses to decide upon a mere motion, (see *Cushing v. Laird*, 4 Ben. 88; *Dennistoun v. Draper*, 5 Blatchf. 336; *The Othello*, 1 Ben. 43;) and, with regard to the second, there is no pretence that the marshal has been misled, and attached the wrong property for lack of a more definite description. The advocate of the libellant has filed with his brief the affidavit of the libellant that the boat performing the service, for which the freight is alleged to be due, is a foreign vessel—both the vessel and the owner belonging to the port of New York. If he deem the fact a material one in the case, he has leave to amend his libel in this respect.

It is conceded that the jurisdiction of courts of admiralty in matters of contract is confined to those that are maritime, but it embraces all such, (*Steam-boat v. Phœbus*, 11 Pet. 175;) and a contract for the transportation of freight or merchandise upon navigable waters has always been reckoned maritime in its character. *Canal-boat Walsh*, 5 Ben. 73.

The libel sets forth a contract of affreightment, the performance of the service, and claims a lien upon the cargo for the freight due. Whether the lien exists or not will depend upon the proofs, and cannot be determined on exceptions to the libel. The court will take judicial notice that the waters on which the contract was performed were navigable, without any allegation of the fact in the libel. *The Apollon*, 9 Wheat. 374; *The Steam-boat Jefferson*, 10 Wheat. 428; *Peyroux v. Howard*, 7 Pet. 342.

The exceptions must be overruled, and the respondents having answered let an order be entered referring this case to the commissioner for proofs.

SOUTHERN EXPRESS Co. v. L. & N. R. Co.

(Circuit Court, M. D. Tennessee. ———, 1880.)

1. RAILROADS—EXPRESS BUSINESS.—A railroad cannot discriminate in its own favor in the conduct of the express business.
2. SAME—RIVAL COMPANY—SUPERVISION.—A railroad cannot exercise a supervision over a rival company in the conduct of the express business.
3. SAME—EXPRESS COMPANY—RATES—NOTICE.—An express company is entitled to some notice from a competing railroad of an intended change in rates and privileges in the conduct of the express business.

KEY, D. J. In the investigation of this case I have come to no conclusions different from those announced by the circuit judge of this district in another controversy between the same parties in respect to the relations, duties, and general course of dealing between railroads and express companies. I am content to follow his rulings, so far as they are relevant to this suit, and shall enter upon no reiteration of the doctrines he has asserted.* The conduct of the express business is no part of the duty of railroads. Until within a recent period there has been, in this country, no effort on the part of railroads to carry it on. They have been content not only to permit this business to be done over their lines by others, but have fostered it, by the terms allowed and opportunities given, until it has grown into a distinct, separate, and organized branch of general business, different in its methods and characteristics from the natural and legitimate transactions of railroads.

Expressage has grown into a public necessity. The idea cannot now be entertained that railroads directly, or by indirection, can trammel or destroy express enterprises by excluding express companies from their lines, or by fettering them with unjust regulations or unfair discriminations. Nor can

*See *Dinsmore v. Louisville, Cincinnati & Lexington Ry. Co.* 2 FED. REP. 465. See, also, *Dinsmore v. Louisville, New Albany & Chicago R. Co.* 3 FED. REP. 593.

a railroad assume to itself the exclusive right or privilege of carrying on the express business over its own lines or any portion of them. I do not undertake to say that a railroad may not undertake to act as an expressman, but, if it should undertake to do so, it must do it as an expressman and not as a railroad. It is no part of its duty or privilege as a railroad. If, then, in the conduct of its business as expressman, its duties, relations, and operations be different and distinct from those appertaining to it as a railroad, it must treat its express department as though it had a separate individuality from that of the railroad—as though it were a stranger to the railroad in so far as it relates to its transactions with other express companies. It must give to it no opportunities, advantages, or privileges it does not allow to other express companies carrying on a like business. The very fact that the interests and rivalries of a railroad doing such a business tempt its officers and employes to secretly discriminate in its favor, and that it has so many opportunities and advantages in the conduct of its operations to covertly discriminate in its favor as against the express company which may be the rival of the railroad on its lines, demands that courts must hold railroads which incorporate expressage as a branch of their business transactions to a strict and rigid impartiality, so far as it may be possibly done.

In dealing with this case the Louisville & Nashville Express Company must be considered and treated by the railroad as though it were a company or person in nowise connected with or belonging to the railroad, in so far as privileges and advantages are given it. It must have no better treatment than a stranger company doing a similar business over its lines under like conditions. Both are to be regarded as customers of the railroad, and neither as being a part of it. If it be said that this is impossible, the reason for rigid enforcement, or as near an approach to an impartial administration of their affairs as may be, becomes the more imperative.

Are the principles herein stated observed in this case? Here are two companies doing an expressage over these lines.

One belongs to the railroad operating the lines, the other does not. Have they equality of position and impartial terms? I think not. Let us see.

October 6, 1880, an officer of the railroad, denominated the general superintendent of the express department, issued this order:

"To Messengers: Commencing with Monday, October 11, and until otherwise instructed by me, you will take a correct account of all matter carried by the Southern Express Company over the Selma Branch, Owensboro Branch, and the Mobile & New Orleans Railroad; this tally to include the contents of their safes and chests. If the Southern Express Company's messengers decline to give you a memorandum of the contents of their safes and chests, you must so note on the bottom of the tally sheet. We do not care for the name of the consignee of either money or freight. All we want is the articles, weight, or value, as the case may be."

Because the agents of the Southern Express Company refused to allow an inspection of the safes and chests, or to render a list of the contents, some of the agents of the defendant removed the packages from the train, or refused to carry them on the road. Thereupon this order was issued, dated October 12, 1880:

"We must not refuse safes or closed chests because the Southern Express Company refuses to allow us to inspect the contents, or to give us a list of contents; but each article offered to be carried is to be tallied by weight. But if several articles are enclosed in one closed chest or package, we must take them as one article. If they refuse to tally by weight, then refuse to carry the freight."

The superintendent of the express department of defendant says that "agents of the defendant were directed to ask the value of the contents of safes and weight of chests, and to place a value on safes if the agents of the plaintiff refuse to give the value."

Under these orders and regulations the agents of the express department of the defendant, as such, were directed

and required to exercise this supervision over and make these demands of the agents of the plaintiff, while the plaintiff or its agents had no corresponding or reciprocal right or privilege. It was the agents of defendant's express company that were required to thus supervise the plaintiff's transactions. The first order assumes the right of defendant's express company to demand and require an inspection of the safes, chests, and packages of the plaintiff, and the direction given, that if such inspection is refused, or the required memorandum furnished, the fact is to be noted on the tally sheet, indicates that further action of some sort is to be predicated upon this refusal. Nor does the order of October 12th oppose or deny this conclusion, but only directs that the chests must be carried notwithstanding the refusal; but, as the superintendent states, defendant's express agents were to place a value on the contents of the safes which they were not permitted to inspect, and of whose contents no memorandum was furnished. Without stopping to inquire whether the railroad, as such, could demand and enforce this supervision legally, it is enough to say that, according to the views herein expressed, it had no power to authorize and require that the rival and competitor of the plaintiff along and over its lines should exercise this superior prerogative over the business of plaintiff.

Again. It appears from the allegations of the bill, which, as to this, are not contravened or denied, that defendant took charge of these lines in June last, or before, and carried the agents and freight of plaintiff at the same rates and upon the same terms as had been done by defendant's predecessors, and continued to do so without objection or question until, without any notice, the order of sixth of October was issued and fare was demanded for plaintiff's messengers. Defendant says that it had no notice of the contract with its predecessors, yet it is reasonable to infer that some understanding, express or implied, had been existing between the parties in relation to the matter by which the rates had been fixed, and the terms and privileges established; and the continuance of

these rates and privileges for several months by the defendant after it took control of the lines was, at least, so far an adoption of the terms as to demand some notice in advance to plaintiff of the contemplated change, especially when the railroad was the competitor of the plaintiff in the operations affected by the change.

The general manager of the defendant says: "Under present existing circumstances I would even say that the railroads and the Louisville & Nashville Railroad Company are able to do the express business better than any express company possibly could. This is due to the consolidation of railways into great through lines. For example, the through route between New York and New Orleans *via* the Mobile & Montgomery Railway is operated by two companies only, * * * whilst on the same through route small express companies are in existence. It would, therefore, only be necessary to have one interchange, if both railroads work their own express. Further, the railroad companies can, through their employes, to-wit, agents at different stations, train men, baggage masters, etc., do the express business at lower rates and with much more satisfaction to the public than any express company could, as in many cases the railroad companies have not to employ several employes to do the express business. When the express companies were first established they were a matter of convenience, caused by the many railway companies of short distances between important points, where innumerable interchanges of business would have to be made, and it would have been inconvenient to manage this business by each company separately on its own line. It was then that, in conjunction with the railways, the express lines and fast through freight lines were permitted to come on railways under special, and in most cases exclusive contracts, giving them all possible inducements to establish through routes for fast freight or express business between grand commercial centers, thereby fostering interstate commerce. These express companies have, under the existing exclusive contracts with the railway companies, been enabled to establish, not only a

through business, but to make large and profitable returns to the stockholders. But, under the present system of consolidations of innumerable small companies into grand through lines, the necessity no longer exists, and for the aforesaid reasons the railway companies are much better able to do the express business themselves than any express company could, and the public will be vastly benefited thereby. The exclusive contracts which were originally granted to the different express companies, and which they have heretofore enjoyed, were granted merely for the reason that no two or more could have been allowed to come on one road, because the railways would not have been able to give them both the same facilities in space and in attendance, and it would be a matter of impossibility for any railway company to work its express business by more than one company to any advantage to the railway company, the express company, or to the public. More than one express company would increase the expense to the railway company in such a material way that very different terms would have to be made and compensation asked than their former exclusive contracts specified, as in most cases an additional car would have to be hauled for each company on the fast passenger trains, which carry the United States mail, and which, with the present condensed fast schedules and time cars, it would not be possible to do, except by providing specially-constructed machinery for the purpose, as we would, with the present facilities we have, delay the mails and cause inconvenience to the passengers and the public at large; when, in point of fact, a great many of the large railway companies of this country have already dispensed with fast freight lines and express companies on their different systems, and are now doing their own express business to the best satisfaction of themselves and the public. The railway companies are able to give as satisfactory attention to the collection, transmission, and delivery of express matter as the express companies can possibly give. The Louisville & Nashville Railroad Company is now doing its own express business, and meeting all the demands of the public for express accommodations."

This long quotation has been given that the theory of defendant on this question may be understood. Concisely stated, it is that when it was inconvenient for railroads to do express business, express companies were fostered and encouraged by them; but that now, as the business had become profitable, and railroads could conduct it conveniently, and as no railway could allow two express companies on its line, the railroad companies should monopolize the entire business on their lines, and, as some great lines had already done, dispense with the express companies and do the business themselves. Now, if in the field of fair competition the railroad has the advantages over express companies which are so forcibly stated by the general manager of defendant, and if, as he states, express companies had been encouraged and fostered by railroads until it had become a profitable business, making large returns to their stockholders, it would be unjust and most inequitable to allow railroad companies now, by unfair preferences, or the assumption of superior power and authority, to drive them from their lines that the railroads might do the business.

Under the views I have taken of this case a preliminary injunction must be awarded, continuing, until the further order or decree of the court, the provisions of the restraining order heretofore granted in the cause.

CHESTER v. THE LIFE ASS'N OF AMERICA and others.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. **EQUITY PRACTICE—NEW PARTIES—REVIVOR.**—A bill having become defective by the dissolution of a defendant corporation, it is proper practice for the plaintiff to bring in the statutory assignee by a supplemental bill in the nature of a bill of revivor.
2. **SAME—PETITION TO BECOME A DEFENDANT.**—The assignee of an insolvent and dissolved defendant corporation cannot, upon his own petition, become a defendant against the consent of the plaintiff, where his only interest is to effect a dissolution of an injunction.

3. **INJUNCTION—WHERE THE DEFENDANT CORPORATION BECOMES EX-TINCT—HOW DISSOLVED.**—When a defendant corporation becomes dissolved, its assignee may, upon motion or petition, obtain a rule to have an injunction against it dissolved, unless the plaintiff shall, within a specified time, revive the suit against the assignee; but he cannot by petition become a defendant, and proceed to hearing on the record, without the plaintiff's consent. He has no such interest as authorizes him to revive and continue the suit, where a dissolution of the injunction is the only object of the proposed revivor by him.
4. **EQUITY PRACTICE—NEW PARTIES—APPLICATION TO BECOME—RULE AND EXCEPTIONS.**—The general rule, that no one will be admitted as a party against the consent of the plaintiff, has certain exceptions, which are stated, and their application to the case in judgment denied.

Wright, Folkes & Wright, for petitioner.

Heiskell & Heiskell, for plaintiff.

HAMMOND, D. J. This is a bill for the rescission of a contract or for an account, as the right may appear, and the defendant company is under an injunction restraining it from selling, under a deed of trust, the lands of the plaintiff to secure a debt due the company. The parties being at issue and the cause ready for trial, one William S. Relfe presents his petition, stating that the insurance company, having become insolvent, has been, by a decree of the proper court in Missouri, dissolved; and that he, by operation of law and the said decree, has become invested with the right to all its assets, including the debt due by the plaintiff, and has been charged with the duty of collecting them. He asks to be made a party defendant, and to proceed to trial without delay, so that the injunction may be dissolved and he allowed to enforce the trust. The plaintiff, on the other hand, presents a supplemental bill setting up the same facts, and asks leave to file it against Relfe, and thereby to revive the suit, and resists the application of the petitioner to become a defendant on his own motion.

The loose practice condemned by Chancellor Cooper in the case of *Stretch v. Stretch*, 2 Tenn. Ch. 140, and supposed by him not to be authorized by the Tennessee Code or the supreme court, has created a very general confusion on the subject of bringing in new parties to a chancery suit in the

state courts, from which this court is not entirely exempt, because of the difficulty experienced of abandoning a habit of practice acquired in one court when coming into the other. The learned counsel for the petitioner here insists that this application is supported by the English cases, and frequent recognitions by the federal courts, and I have taken this occasion to examine the subject with a view to ascertain the proper practice. There can be no doubt whatever that Relfe's interest is of that character which renders it necessary for the plaintiff to bring him in as a party, and that without his presence as a defendant the suit could not proceed. There has been a devolution of interest by operation of law, but he does not occupy the attitude of a purchaser *pendente lite*, to be brought in or not at the election of the plaintiff. He *represents* the company, as well as owns its title, and he alone, the company being dissolved, can account for it, if an account shall be necessary.

The case comes, therefore, precisely within the category provided for by equity rule 57, and under all the authorities the plaintiff cannot proceed without a supplemental bill in the nature of a bill of revivor. *Kennedy v. Georgia Bank*, 8 How. 586, 610; *Clarke v. Matthewson*, 12 Pet. 164; *Justice v. McBroom*, 1 Lea, 555, at page 558; *Northman v. Insurance Co.* 1 Tenn. Ch. 317; *Stretch v. Stretch*, 2 Tenn. Ch. 140; *Steele v. Taylor*, 1 Minn. 274; *Slack v. Walcott*, 3 Mason, 508; *Anderson v. Railroad*, 2 Woods, 628; 2 Danl. Ch. Pr. (5th Ed.) c. 33, p. 1506 *et seq.*

But the court has no power to compel the plaintiff to revive. He may file a new bill, if he choose, or never revive. He might, I take it, go to Missouri, and file his bill there against Relfe. *Thompson v. Hill*, 5 Yerg. 418; *Spencer v. Wray*, 1 Ver. 463; *Anon.* 3 Atk. 486.

This would seem a sufficient reason for not allowing the petitioner, against the consent of the plaintiff, to become a defendant to this suit, were it not manifest that he has an interest in ending this suit, at least, so far as to procure a dissolution of the injunction, which restrains him from realizing his debt by a sale of his security. This is, it seems to

me, all the interest he has in pressing a trial after the suit has become so defective that it can never proceed against him without a revivor. There are, undoubtedly, cases—generally, those where a decree has been rendered and there has subsequently been a change of parties—in which *the defendant himself or his representative* may revive a suit by supplemental bill in cases of strict revivor, or by original bill in the nature of a supplemental bill in other cases; but he cannot do this by *petition* or *motion*. *Thompson v. Hill*, *supra*; 2 Danl. Ch. Pr. (5th Ed.) 1539, and notes.

But where the only interest of the representative is to dissolve an injunction, which is this case, he does not proceed by a bill to revive. 2 Danl. Ch. Pr. 1539, at note 8. It is said he must proceed in the ordinary way to procure a dissolution of the injunction, and I find that to be by motion for a rule that the injunction stand dissolved, unless the plaintiff shall within a short time, usually 12 days, file his supplemental bill or bill of revivor. *Kerr*, Inj. 633, and cases; 2 Danl. Ch. Pr. (5th Ed.) 1539, note 7 and cases; *Id.* 1544, note 1 and cases; *Id.* 1679, note 5 and cases; *Thompson v. Hill*, and cases cited. This furnishes the defendant here a sufficient remedy to get rid of the injunction, and I have no doubt his petition could be entertained for that purpose; for whatever one may do by motion he may do by petition, and it is proper to file one wherever intricate facts are to be stated as a basis of the motion. 2 Danl. Ch. Pr. 1592, 1603. But that is not the purpose for which this petition is offered, and if it were it would be dismissed, in the face of an application by the plaintiff to file his supplemental bill. Even where the defendant may file a supplemental bill preference will be given to the application of the plaintiff to file *his* supplemental bill. *Carow v. Mowatt*, 1 Edw. Ch. 9.

The case most relied on by the learned counsel for the petitioner is *White v. Hall*, 1 Russ. & Myl. 332. But see *Bozon v. Bolland*, *Id.* 69. He also relies on *Young v. Everest*, *Id.* 426. In the first case the father, who was named as one of the executors in the will, was out of the jurisdiction when the bill was filed, and, it being a bill against the executors, he was

allowed to become a party on his own application. In the other case the stranger to the record did not become a party, but appeared to protect his interest in the distribution of a fund in a case where, before decree, he might have become a *quasi* party by petition. Both of these cases fall within the exception mentioned by Mr. Justice Bradley in *Anderson v. The Railroad*, *supra*; 2 Woods, 628, 630; Danl. Ch. Pr. 540, note 1, and cases; Id. 153, and notes; Id. 281, and notes 7-9; Id. 287, note 2; Id. 1506 *et seq.* And see *Barribeau v. Brant*, 17 How. 43, 46; *Ransom v. Davis*, 18 How. 295.

Mr. Chancellor Cooper says, in his note to Daniell, that "no such practice is known in equity as making a person a defendant upon his own application, over the objection of the complainant." 2 Danl. 287, note 2. And in *Stretch v. Stretch*, *supra*, he mentions as the only exception the case of trustees and beneficiaries. Mr. Justice Bradley, in *Anderson v. The Railroad*, *supra*, adverts to other exceptions which he mentions, such as scandal against a stranger, or where he is a purchaser *pendente lite*, where the applicants are creditors allowed to prove their debts, or they are persons belonging to a class for or against whom a suit is brought. I have examined a good many of the cases cited in the authorities already mentioned, and think that this case falls within none of these exceptions. I have already endeavored to show why Relfe cannot revive the suit as one upon whom the representation and title of the defendant company have devolved by law, and what his proper remedy is to dissolve the injunction—the only object he can have in a revivor in his own behalf.

The exceptions may be divided into three classes, leaving out those where the stranger to the record may appear for scandal: *First*, where the person applying has been named in the bill as a party, and, not being served with process, comes within the jurisdiction and offers to become a party; *second*, where he represents a party whose interest has been transmitted by death or devolution by operation of law, and the case is one that requires him to be received as a party; *third*, where the bill has been filed for or against a class, in which case, if the petitioner belongs to the class, he may

become an actual or *quasi* party, as may be necessary to protect his interest. Several cases are cited where a stranger, not within these exceptions, has been allowed, upon his own petition, to become a party; but it will be found, I think, that no objection was taken. *Galveston v. Cowdrey*, 11 Wall. 459; *Ex parte Railroad Co.* 95 U. S. 221.

In this last case the stranger came in by petition, was made a defendant, and filed an answer and a cross-bill. Pending the suit this defendant assigned its interest, and the question involved was whether after the assignment the cross-bill could proceed in the name of the assignor, and it was held that it could. The court says that "an assignee *pendente lite* may, at his own election, come in by appropriate application and make himself a party, so as to assume the burdens of litigation in his own name, or he may act in the name of his assignor." And in the *Jenny Lind*, 3 Blatchf. 513, the court says that it is a common practice in admiralty and equity to allow persons interested in the subject-matter to come in and protect their interests. I do not think these cases are against the positions assumed in this opinion, if it be remembered that in proceedings *in rem* the persons interested in the *res* are all admitted, on the principle that they belong to a class for or against whom the proceedings are taken. And, in the case of the railroad company, the court did not discuss or have occasion to determine whether the stranger who came in without objection had a right to come if objection had been made, nor whether the assignee *pendente lite* could have come in by petition.

Other cases have decided against the right of the stranger to come in by petition, where the question was made, as we have already seen. *Coleman v. Martin*, 6 Blatchf. 119; *Drake v. Goodridge*, Id. 151; *Foster v. Deacon*, 6 Madd. 44.

The petition of Relfe will be dismissed, and the plaintiff has leave to file his supplemental bill.

DWYER, Adm'x, etc., v. NATIONAL STEAM-SHIP CO.

(Circuit Court, E. D. New York. ———, 1880.)

1. NEGLIGENCE—OPEN HATCHWAY—SHIP.—An open hatchway on a ship, when provided with the usual combings, is not evidence of negligence on the part of the ship-owner.
Murray v. McLean, 57 Ill. 378.
2. SAME—EMPLOYER—INDEPENDENT CONTRACTOR.—An employer is not answerable for the negligence of an independent contractor.
Pickard v. Smith, 10 Com. Bench. N. S. 470.

Motion to set aside verdict, and for new trial.

Morris & Pearsall, for plaintiff.

John Chetwood, for defendant.

BENEDICT, D. J. This is an action at law to recover of the owners of the steam-ship *Canada* for the death of one John Dwyer, who fell through the hatchway of that steamer on the twentieth of October, 1878, and was killed. At the trial the court directed a verdict for the defendant. A motion to set aside the verdict and for a new trial has been made, and is now to be disposed of.

The facts appearing at the trial are as follows: The deceased, on the morning of October 30th, and while in the act of arranging the pipe of a grain elevator in the hatch, stepped upon a section of the grating of the hatch, the section tilted under his weight, and he fell through the hatchway to the orlop deck and was killed. The hatchway was about 12 feet long. The grating was constructed in sections, each section about two feet wide, and intended to fit in a groove when in position. No defect of construction or weakness of materials in the grating is pretended. The section on which the deceased stepped did not break, but tilted under his weight, and solely because it was not properly placed in the groove where it was intended to fit. Had it been in its proper position it would have been abundantly strong to support the deceased without danger. Similar hatchways having similar gratings are a common feature in vessels of this class. They are a necessary feature in the deck of a ship, and their position in the ship is controlled by the necessity of the business.

It appeared in evidence that during the night before the accident in question the gratings had been placed upon this hatchway, with a tarpaulin over them for the purpose of preventing the falling rain from wetting the grain then being loaded into the steamer by means of the elevator. There was no direct evidence showing by whom the grating was placed upon the hatchway, or how it was there placed, or whether it remained in the position as first placed up to the time of the accident. It was proved that a few moments before the accident men employed by Walsh Brothers, stevedores, had taken off the tarpaulin from the hatchway, and removed several sections of the grating in order to facilitate their labor in loading the cargo. At the time of the accident the deceased and others employed by Burgess, the owner of the elevator, were engaged in putting another length of pipe to the elevator pipe for the purpose of passing grain through the hatchway into the hold. The deceased was an employe of Burgess, who had a contract with the defendant to transfer the grain from a canal-boat to the steamer. The deceased was not, therefore, the servant of the defendant, but of Burgess, an independent contractor.

Walsh Brothers were also independent contractors, who had a contract with the defendant to discharge and load the steamships of the line at so much per ton. The stevedore's men at work on the cargo at this time were, therefore, not the servants of the defendant, but of Walsh Brothers.

The cause of the accident is clearly proved to have been the unsafe manner in which the section of the grating upon which the deceased stepped was placed upon the hatchway. The actual wrong-doer was the person who placed the grating upon the hatchway during the night, or some person who changed the position of the grating after it had been so placed; but there is no evidence from which it can be determined whether the negligence occurred at the time the grating was placed upon the hatchway, or at a subsequent time, or by whom the negligent act was done. Accordingly it is contended that the defendant, being the owner of the steamer, was charged with the duty of maintaining the hatchway in a

safe condition, and by reason of the failure to discharge that duty is liable, without proof as to who was the wrong-doer.

If I were convinced that the condition of the hatchway, at the time of the accident, was proof of a failure on the part of the defendant to discharge a duty attaching to him in respect to the hatchway, I should find no difficulty in holding the defendant liable, whether the grating was misplaced by the stevedore, the elevator men, or the crew of the vessel. But I cannot agree to the proposition that it was part of the defendant's duty to maintain a safe covering upon this hatchway. Hatchways are well-known features and sources of dangers on a ship. They are intended to be open a large portion of the time, especially when in port, not only for the purposes of loading and unloading cargo, but also for ventilation. An open hatchway on a ship, when provided with the usual combings, is not evidence of a neglect of duty on the part of the ship-owner. On the contrary, a ship-owner has the right to allow the hatchways of his ship to remain uncovered and unprotected, except by the usual combings; and all persons moving upon the decks of a ship are chargeable with notice of the probable presence of open hatchways on the deck. Neither is it the duty of the ship-owner to maintain a guard stationed at the hatchway of his ship for the purpose of protecting persons from injury by falling into it. Such a duty would be burdensome in the extreme, and is not required by the law. *Murray v. McLean*, 57 Ill. 378. The requirement would be unreasonable, has never been observed in practice, nor, so far as I know, declared in any adjudicated case.

The cases cited, where the injury arose from defective machinery, afford no support to the position taken by the plaintiff, because here there is no pretence that the injury arose from any defect, weakness, or faulty construction of the grating. The cases cited, declaring a liability for injury arising from holes in thoroughfares, improperly protected holes in floors, and the like, are equally inapplicable here. The deck of a steamer is not a highway, and is a place where open hatchways must be maintained, and therefore are to be expected and avoided.

More in point are the cases where injury has arisen from man-traps, by which a person has been lured into a dangerous position, to his injury, although it is not clear that a grating upon a ship's hatchway can in any proper sense be said to be a lure. Indeed, I do not find any adjudicated case that can be considered authority for holding that a ship's hatchway, wholly uncovered as to a large portion, and insecurely covered as to a small portion, by reason of an improperly-placed section of the grating, about which stevedores and elevator men were at work, is calculated to expose the men to an unforeseen or unnecessary danger.

The character and uses and location of a ship's hatch, even when wholly covered by a grating, are calculated rather to warn than to induce a person to stand upon the grating, and certainly such would be the case when, as here, only a portion of the grating was upon the hatch. But if it be assumed in this case that the presence of some of the sections of the grating upon the hatchway at which the deceased was working gave him the right to suppose that those sections afforded a safe standing-place, the liability of the defendant does not appear until it be shown that the insecure section was put in its unsafe position by the defendant. As has been seen, no liability attaches to the defendant by reason of a failure to discharge a known duty. If the defendant is liable at all, that liability arises not from an act of omission. He had the right to omit to cover the hatchway, and the bare fact that it was wholly uncovered, or partly uncovered, is not sufficient, therefore, to establish his liability. He is liable, if at all, for an act of commission, namely, the act of placing the grating upon the hatch in a negligent manner, or the act of disturbing the grating after it had been placed upon the hatchway in a proper manner.

The decisive question, therefore, is whether there was sufficient evidence to authorize the jury to find that the defendant improperly placed the grating upon the hatchway, or disturbed it after it had been once properly placed. Here the case of the plaintiff rests upon the presumption that everything done on board the steamer, in respect to the hatchway, was di-

rected to be done by the owner of the steamer. There is evidence showing that gratings were put on the hatchway during the night, leaving one off for the passage of the elevator pipe, and that a tarpaulin was put over the hatchway to keep the falling rain from reaching the grain as it went into the ship. But there is no evidence to show who it was that put on the grating or the tarpaulin, or to show that the section which gave way under the deceased was disturbed after being put on in the night. There is a bit of evidence showing that the crew of the steamer were employed in washing the decks during the night, and it has been argued that the grating and tarpaulin were put on at that time to protect the cargo from the water used to wash the deck. But the evidence is positive that neither the grating nor the tarpaulin were put on or disturbed at that time, nor for that purpose.

Conceding that the plaintiff is entitled to invoke the presumption upon which, in the absence of evidence as to the fact, he is compelled to rely, the difficulty is that the case contains evidence by which the presumption is overthrown. The positive testimony of the boatman of the steam-ship from the steamer's deck, that he did not meddle with the grating, or see it meddled with by any of the crew, and the evidence showing that it would be for the stevedores engaged in loading the vessel to put on and remove the grating at the hatchway, is sufficient evidence to repel any presumption that the wrong-doer was one of the crew. The evidence points so strongly to the stevedores as the wrong-doers as to forbid any other conclusion by the jury. Indeed, it appears to be conceded, in behalf of the plaintiff, that such was the fact; for one point made in the brief is that the defendant "by the contract authorized Walsh to do the very act which caused the injury, to-wit, to remove the hatches, and is responsible for his negligence."

The case is, then, reduced to the question of law, whether the defendant is responsible for the negligent act of the stevedore in improperly placing or in displacing the grating on which the deceased stepped.

Upon this question I entertain no doubt. The contract with the stevedores, Walsh Brothers, was to load and unload the cargoes of this and other steamers belonging to the defendant at so much per ton, and, as is said in the plaintiff's brief, "the injury complained of did not result directly from anything which the contractor was bound by his contract to do." If defendant had been under a duty to protect this hatchway by gratings or otherwise, or if the stevedore had been employed or directed by the defendant to cover this hatchway, the case would have been different; but, in the absence of any such duty devolving upon the defendant, or of any evidence of such employment of the stevedore by the defendant, it is quite clear that the defendant's liability has not been established. The case comes within the rule declared in a case greatly relied on by the plaintiff, where it is said: "If an independent contractor is employed to do a lawful act, and in the course of the work commits some casual act of negligence, the employer is not answerable." *Pickard v. Smith*, 10 Common Bench, N. S. 470.

The motion to set aside the verdict must be denied.

COOPER MANUF'G CO. v. FERGUSON.

(Circuit Court, D. Colorado. ———, 1880.)

1. FOREIGN CORPORATION—CAPACITY TO MAKE CONTRACTS—STATUTE OF COLORADO.

This action was upon a contract for the manufacture and delivery of certain machinery. Plaintiff is a corporation, organized under the laws of Ohio. The statute of Colorado provides that "foreign corporations" shall, before they are authorized to do any business in this state, file in the office of the secretary a certain certificate. The defendant pleaded that the contract declared upon was entered into within the state of Colorado, and that the plaintiff had never complied with the statute. It did not appear that plaintiff had engaged

in general business within the state, or assumed to exercise its corporate powers in any other instance.

McCRARY, C. J., held the statute applicable, and the answer sufficient.

HALLETT, D. J., dissented.

MAY and others v. SIMMONS, Collector.

(Circuit Court, D. Massachusetts. —, 1880.)

1. REVENUE—LAW—CONSTRUCTION.—The denomination of articles enumerated in a revenue law is construed according to the commercial understanding of the terms used, and not with reference to the materials of which such articles may be made, or the use to which they may be applied.

Curtis v. Martin, 3 How. 109.

Elliot v. Swartwout, 10 Pet. 137.

2. SAME—"TIN PLATES"—REV. ST. § 2503.—"Tin plates" are not included in section 2503 of the Revised Statutes, under the terms "metals not herein otherwise provided for," or "manufactures of metals."

Dodge v. Arthur, 22 Int. Rev. Rec. 402, criticised.

3. SAME—SAME—REV. ST. § 2504, SCHED. E.—"Tin in plates or sheets" is subject to a duty of 15 per cent. *ad valorem*, in accordance with the provisions of section 2504 of the Revised Statutes, schedule E.

CLARK, D. J. The plaintiffs, in 1874, imported into the port of Boston 5,581 boxes of tin plates. The defendant, then collector of the port, assessed and collected a duty of 15 per cent. *ad valorem* on these plates. The plaintiffs paid the duty under protest, contending that the duty should have been only 90 per cent. of 15 per cent. *ad valorem*; and the question to be considered here is whether the duty of 15 per cent. *ad valorem* was correctly laid, or whether it should have been, as plaintiffs contend, 90 per cent. of the 15 per cent. *ad valorem*.

By section 2504 of the Revised Statutes, schedule E, p. 470, "tin, in plates or sheets," is subjected to a duty of 15 per cent. *ad valorem*, and under this provision of the law the collector assessed the duty. But section 2503 of the Revised Statutes provides: "There shall be levied, collected, and paid

upon all articles mentioned in the schedules contained in the next section,"—that is, section 2504, just cited,—“imported from foreign countries, the rates of duty which are by the schedules, respectively, prescribed: *provided*, that on the goods, wares, and merchandise in *this section* enumerated and provided for, imported from foreign countries, there shall be levied, collected, and paid only 90 per centum of the several duties and rates of duty imposed by the said schedules upon said articles severally—that is to say, on all manufactures of cotton, of which cotton is the component part of chief value; on all wools, hair of the alpaca, goat, and other animals, and all manufactures wholly or in part of wool, or hair of the alpaca, and other like animals, except umbrellas, parasols, and sun shades covered with silk or alpaca; on all iron and steel, and on all manufactures of iron and steel, of which such metals, or either of them, shall be the component part of chief value, excepting cotton machinery; on all metals not herein otherwise provided for, and all manufactures of metals, of which either of them is the component part of chief value, excepting percussion-caps, watches, jewelry, and other articles of ornament: *provided*, that all wire rope and wire strand, or chain made of iron wire, either bright, coppered, galvanized, or coated with other metals, shall pay the same rate of duty that is now levied on the iron wire of which said rope, or strand, or chain is made; and all wire rope, and wire strand, or chain made of steel wire, either bright, coppered, galvanized, or coated with other metals, shall pay the same rate of duty that is now levied on steel wire, of which said rope, or strand, or chain is made; on all paper and manufactures of paper, excepting unsized printing paper, books, and other printed matter, and excepting sized or glued paper suitable only for printing paper; on all manufactures of India rubber, gutta percha, or straw, and on oil-cloths of all descriptions; on glass and glassware, and on unwrought pipe clay, fine clay, and fuller's-earth; on all leather not herein otherwise provided for, and on all manufactures of skins, bone, ivory, horn, and leather, except gloves and mittens, and of which either of said articles is the component part of chief value, and on liquorice-

paste or liquorice-juice." And the plaintiffs contend that, under the provisions of this section, "tin plates" should have been assessed 90 per cent. of 15 per cent. *ad valorem*, instead of the entire 15 per cent.

If the plaintiffs are right in this position, it must be because "tin plates" are included in some of the general classifications of the section, as they are not mentioned, *eo nomine*, therein. The only classifications in which they can be included are metals or manufactures of metals. But they cannot be included among metals, because the metals mentioned are metals *not herein otherwise provided for*, and "tin plates" are otherwise provided for in the following section, schedule E, p. 467, of the Revised Statutes.

It is objected that the words "herein otherwise provided for" apply only to section 2503, and do not extend to other sections in the title; but this limitation or construction cannot be admitted, because—*First*, congress, in limiting or defining the goods, wares, and merchandise to which the provisions in section 2503 should apply; uses the more precise and restrictive words "*in this section enumerated*;" and, when it afterwards uses the words "not herein provided for," must have intended something different and more extended, especially as both expressions occur in the same section. They can hardly be held to be synonymous. *Second*, because the words "herein provided for," "or not herein provided for," as used in the United States Statutes, generally, if not always, refer to the act, chapter, or title, and not to the section. Before the revision they referred to the act or chapter, and since, more generally, to the title. *Third*, because, in section 2 of the act of June 2, 1872,—from which the provisions of section 2503 of the Revised Statutes are copied almost *verbatim*, and where this precise expression is used, and in the same manner, application, and connection,—it evidently does not apply to the *section 2* in which it is used, but extends to other provisions of the act. *Fourth*, because, to give the words the limitation or application contended for by the plaintiffs, they are rendered useless and meaningless in the section. There are no metals otherwise provided for in the

section, and it would have been just as well to have omitted them and to have said *metals*, simply, as to have said metals "*not herein otherwise provided for.*"

It is objected by the plaintiffs that, if the words are construed to extend beyond the section, there is nothing for them to operate upon; and that so, they would defeat the object of this proviso; but that can hardly be so.

If examination be made of the concluding paragraph of schedule E, Rev. St. 467, it will be found that metals, unmanufactured, *not otherwise provided for*, pay 20 per cent. *ad valorem*, and by this provision of section 2503 they pay 90 per cent. of 25 per cent. *ad valorem*.

If "tin plates" cannot be included among metals "*not herein otherwise provided for,*" are they included in manufactures of metals? The phrase is, "*all manufactures of metals,*" and is broad enough and inclusive enough to include tin plates, which are made or manufactured from iron and tin; yet still the question remains, are they so included? Was such the intention of congress, and is such the proper construction of the statute? We think not, and—*First*, because they are otherwise specifically provided for, both in section 2504 of the Revised Statutes, and in section 4 of the act of June 6, 1872, from which the provisions of the Revised Statutes in question are copied or taken. *Second*, because, in section 2 of the act of 1872, these precise words, "*all manufactures of metals,*" are used just as broad and just as inclusive as in section 2503 of the Revised Statutes, and yet they do not include "tin plates" therein, because tin plates are afterwards expressly provided for in section 4 of the act, (17 Gen. St. 233,) and subjected to a duty of 15 per cent. *ad valorem*. It is difficult to see by what fair construction the words "all manufactures of metals" should be made to include more in section 2503 of the Revised Statutes than they do in section 2 of the act of June 6, 1872, (17 Gen. St., 231,) *from which they are copied verbatim*, with the same context, and made applicable to the same matter; especially as in each case "tin plates" are especially provided for. *Third*, because congress, in the tariff acts, has not

included tin plates among manufactures of metals, but has designated them as tin plates specifically, or included them in some other provision.

In the case agreed, it is stated that "the merchandise in question was properly classified as 'tin in plates,' and is known in commerce only as 'tin in plates, or tin plates,' and does not come under the provisions in schedule E, viz, 'iron and tin plates, galvanized or coated with any metal otherwise than by electric batteries, two and a half cents per pound.'" Now, if "tin plates" are known in commerce only by that name, it would naturally be expected that congress, in framing tariff acts, would also designate them by that name, because the name is specific and definite, and well known among merchants; and tariff laws generally follow the language of commerce. And so we find congress has done. Thus, in the act of July 4, 1779, at the first session of congress (1 Gen. St. 26) "tin plates," specifically named as such, were made free, while tinware was taxed $7\frac{1}{2}$ per cent. *ad valorem*. So, in the act of August 10, 1790, (1 St. 181,) "tin plates" are made free—specifically excepted from duty—while rolled iron and *all wares of tin* are subjected to a duty of $7\frac{1}{2}$ per cent. *ad valorem*. Again, by the act of May 2, 1792, (1 St. 259,) "*all manufactures of iron, steel, tin, pewter, copper, etc., of which either of these metals is the article of chief value, not otherwise particularly enumerated,*" are made to pay 10 per cent. *ad valorem*, but "tin plates" are continued on the free list by section 2 of the same act. This act of congress is particularly observable in this: here is the expression, "*all manufactures of iron, steel, tin, pewter, and brass,*" just as strong, just as clear, just as free from ambiguity as the expression "*all manufactures of metals,*" in section 2508 of the Revised Statutes, and yet it clearly does not include "tin plates."

The act of 1816, April 27th, (3 Gen. St. U. S. 310,) which repealed all former laws imposing duties, imposed a duty of 20 per cent. *ad valorem* upon "all articles manufactured from brass, copper, iron, steel, pewter, lead, or tin, or of which these metals, or either of them, is the material of chief value, —re-enacting this provision of the act of 1792 in very nearly

its precise words,—and upon all articles not free and not subject to any other rate of duty, a duty of 15 per cent. *ad valorem*. It omitted “tin plates” from the free list where they had heretofore been, and made no specific provision for them.

The act of May 22, 1824, (4 Gen. St. 26,) increased the duty “in all manufactures, not otherwise specified, made of brass, iron, steel, pewter, lead, or tin, or of which either of these metals is a component material,” from 20 to 25 per cent. *ad valorem*, but did not mention “tin plates.” But the act of 1832, July 14th, (4 Gen. St. 588,) re-enacts this provision of the act of 1824—to-wit, “on all manufactures, not otherwise specified, made of brass, iron, steel, pewter, or tin, or of which either of these metals is a component material”—in exactly the same words, making the duty 40 per cent. *ad valorem* instead of 25; and it is manifest that this provision does not include “tin plates,” because they are by the same act again made free. See section 3, p. 590, 4 U. S. St.

The act of March 2, 1833, (4 Gen. St. 629,) is instructive in the point now under consideration. It provided (section 1) for a reduction of duties in all foreign imports, where the duty exceeded 20 per cent. on the value thereof.

Manufactures of brass, iron, steel, pewter, and tin, which then paid 40 per cent. *ad valorem*, were included in this provision. The reduction was to be the excess of the duty above 20 per cent., or in other words to 20 per cent. One-tenth of this deduction was to be made on and after December 31, 1833; one-tenth on and after December 31, 1835; one-tenth on and after December 31, 1837; one-tenth on and after December 31, 1839; and on the thirty-first day of December, 1841, one-half the residue of such excess, and on the thirtieth day of June, 1842, the other half, was to be deducted. This left a duty of 20 per centum on the manufactures of brass, iron, steel, pewter, and tin on and after the thirtieth day of June, 1842.

“Tin plates,” at the passage of this act of March 2, 1833, were in the free list, (not included in the manufactures of iron and tin,) and by the fourth section of the act (4 St. 630)

were continued so until June 30, 1842, during all the time these deductions were taking place in manufactures of iron and tin, and then, by section 5 of the same act, were continued, *eo nomine*, on the free list after June 30, 1842, when the duties on manufactures of iron and tin were 20 per cent. *ad valorem*. The act of 1841 (5 Gen. St. 463) laid a duty on some articles then and before on the free list, and increased the duties on articles paying less than 20 per cent., but it continued "tin plates" on the free list.

Coming, then, to June 30, 1842, we find "all manufactures, not otherwise specified, made of brass, iron, steel, pewter, or tin, or of which either of these metals is a component material," paying a duty of 20 per cent., and "tin plates" on the free list. The act of August 30, 1842, (5 Gen. St. 553,) imposed a duty of 30 per cent. on manufactures of brass, iron, steel, lead, copper, pewter, and tin, not otherwise specified; and a duty of $2\frac{1}{2}$ per cent. on "tin plates"—classing them with other metals. The act of July 30, 1846, (9 St. 45,) continues the duty of 30 per cent. on the above manufactures, and imposes a duty of 15 per cent. on "tin plates." The act of March 3, 1857, (11 St. 193,) imposed a duty of 24 per cent. on the above manufactures of iron and tin, and of 8 per cent. on "tin plates." By the act of 1861, March 2, (12 St. 196,) these manufactures are made to pay a duty of 30 per cent. *ad valorem*, and "tin plates" 10 per cent. By the act of 1862, July 14, (12 St. 551,) these manufactures were made to pay a duty of 35 per cent., and "tin plates" 25 per cent. *ad valorem*.

Coming next to the act of 1872, June 6, (17 St. 230,) we find a little different but very significant phraseology. In the prior acts, the expression has been "on all manufactures, *not otherwise specified*," made of brass, etc., leaving it to be argued that "tin plates" were a manufacture of iron and tin otherwise specified. But here the expression is on all *metals* not otherwise provided for, and *on all manufactures of metals* of which either of them is the component part of chief value, except percussion-caps, watches, jewelry, and other articles of ornament.

Now, if "tin plates" be a manufacture of metals, and were intended to be classified and taxed as such, they must come under this expression of *all manufactures* of metals, unless found among the excepted articles. But they are not found among the excepted articles, nor are they taxed, nor were they intended to be taxed by congress under this head of all "manufactures of metals," because they are taxed elsewhere, under a subsequent section of the same act, (section 4,) and at a different rate, as "*tin plates, eo nomine*."

Here is an unbroken legislation by congress from 1789 to 1879, a period of 90 years, in which "tin plates" have not been included in "manufactures of tin or iron," and so taxed, but have generally been designated as "tin plates," and the duties laid on them as such specifically, and at a different rate. We find the same course to be pursued in the Revised Statutes, and if "tin plates" are not included either in "metals not herein otherwise provided for," nor among "manufactures of metals," they are not entitled to the reduction of the duty claimed by the plaintiff, and the assessment by the defendant was correct.

The case of *Dodge v. Arthur*, tried in the southern district of New York, before Judge Shipman, and reported in 22 Int. Rev. Rec. 402, is relied upon by the plaintiffs as an authority in support of their construction of the law on the question; and it is so. But, upon the examination of the charge to the jury in that case, it is unsatisfactory. It proceeds entirely upon the ground that the Revised Statutes have altered the law as it stood in the act of June 6, 1872. It concedes that by the act of 1872 "tin plates" were not included in the words "in all metals not herein otherwise provided for, and in all manufactures of metals of which either of them is the component part of chief value, except in percussion-caps," etc., but maintains that these precise words in the Revised Statutes, if the case is correctly understood, do include "tin plates." But by what process of expansion or inclusion this is done is not explained, and it can hardly be conceded that the charge of the court in that case was correct, especially as "tin plates" are otherwise provided for in the Revised Stat-

utes, and subjected to the same duty as in the act of 1872. If, in the commercial vocabulary, "tin plates" were known as manufactures of tin or iron, or iron and tin, there would be ground for the plaintiffs' position; but they are not so known. The agreed case concedes "that the merchandise in question * * * is only known in commerce as 'tin in plates' or 'tin plates.'"

In *Curtis v. Martin* it was held that the charge to the jury, on the trial of the cause, that "it has long been a settled rule of construction of revenue laws, imposing duties on articles of a specified denomination, to construe the article according to the designation of such articles as understood and known in commerce, and not with reference to the materials of which they may be made, or the use to which they may be applied," was correct. 3 How. 109. Chief Justice Taney, in this case, remarks "that this rule of construction has been followed in every circuit where the question has arisen."

In *Elliott v. Swartwout*, 10 Pet. 137, (12 Curtis, Ab. 46,) it was held that "worsted being a distinct article, well known in commerce under that name, worsted shawls with cotton borders, and suspenders with cotton ends, were not *manufactures of wool*, under the second section of the tariff act of July 14, 1832, (4 St. at Large, 583.) "It is a settled rule," say the court, "to construe the denomination of articles in tariff laws according to the commercial understanding of the terms used."

The judgment is for the defendant.

In re DAVISON.

(District Court, S. D. New York. October 30, 1880.)

1. DESERTION—STATUTE OF LIMITATIONS—REV. ST. § 1342. — The one hundred and third article of war (Rev. St. § 1342) provides that "no person shall be liable to be tried and punished by a general court-martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless, by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period. *Held*, that this article is applicable to the offence of desertion.

2. SAME—"ABSENCE"—REV. ST. § 1342.—*Held, further*, that the word "absence" in such article means absence from the jurisdiction of the military courts.
3. SAME—"OTHER MANIFEST IMPEDIMENTS"—REV. ST. § 1342. — *Held further*, that the words "other manifest impediments," referred to in said article, means only such impediments as operate to prevent the military court from exercising its jurisdiction.

Habeas Corpus.

Hervey Grasse, for petitioner.

A. B. Gardner, for respondent.

CHOATE, D. J. The petitioner, Thomas Davison, seeks to be discharged on *habeas corpus*. He has been arrested as a deserter from the army, and is confined at Fort Columbus, Governor's island. It appears by the return that he enlisted in New York on the twenty-eighth day of July, 1870, for the term of five years, and that he deserted, while on furlough, on the fourteenth day of February, 1872; that he was arrested as a deserter and brought to Fort Columbus on the twenty-first day of October, 1880, and that the preliminary steps have been taken by the proper military officers to have him brought before a general court-martial for trial. It appears by the traverse to the return that at the time of the petitioner's enlistment he was of the age of 19 years, 4 months, and 11 days only; that at that time he had a mother living and dependent upon him for support, and that his mother never consented to his enlistment; that at no time since the fourteenth day of February, 1872, has he been absent from the United States, but, on the contrary, has always resided continuously in the city of New York, which is the place where he is alleged to have committed the offence on the twenty-second day of February, 1872, and where he was arrested in October, 1880. Proof of the facts alleged in the traverse has been waived on the part of the respondent, except that it is insisted that it is not competent for the petitioner to show that he was a minor, because he is alleged to have sworn upon his enlistment that he was 21 years of age.

The prisoner's release is claimed on two grounds—*First*, that at the time of his enlistment he was under the age of 21

years, and that his enlistment was illegal and void, and therefore that he is not liable to be arrested or held as a deserter; and, *secondly*, that more than two years have elapsed since the commission of the alleged offence, and before the issuing of an order for his trial, and that therefore he is not legally liable to be arrested and held for trial as a deserter.

1. As to the first ground, it is objected by the respondent that the oath of the petitioner at the time of his enlistment is made conclusive upon him by the statute in this proceeding. Such has been held in this court to be the proper construction of the statute. *In re Cline*, 1 Ben. 338; *In re Stokes*, Id. 341. It is also insisted that the enlistment of a minor over 18 years of age, without the consent of his parents, was not illegal under the laws in force at the time the petitioner enlisted. Such has been held to be the law in this court. *In re Riley*, Id. 408.

It is insisted on the part of the petitioner that more recent decisions to the contrary have been made on both these points, of such weight and authority as to make it proper for this court to re-examine the questions. *Seavey v. Seymour*, 3 Cliff. 439; *Turner v. Wright*, 2 Pittsb. 370, 5 Phil. 296; *Henderson v. Wright*, 2 Pittsb. 440, 5 Phil. 299; *Com'rs v. Leake*, 8 Phil. 523. It is, however, unnecessary to consider this point, because the other ground for discharging the prisoner is well taken.

2. The one hundred and third article of war (Rev. St. § 1342) provides that "no person shall be liable to be tried and punished by a general court-martial for any offence which appears to have been committed more than two years before the issuing of the order for such trial, unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period."

It is insisted on the part of the respondent that by "absence" is here meant absence from the post of duty, and that this article has no application to desertions. It is certainly a startling proposition that there is no limitation at all upon prosecution for the offence of desertion; that one who has

once been a deserter is subject during the whole of his natural life to be brought before a military court and tried and punished for this offence, even in extreme old age. Yet this is seriously contended by the learned counsel for the respondent. The statute does not require, nor, in my opinion, admit of so strict and narrow a construction. There is nothing in this article itself clearly indicating that it does not extend to every military offence. As it is the only article limiting the time of prosecutions, the presumption is very strong that it extends to every military offence; for, with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial. The language of this statute of limitations must be construed with reference to the use of similar language in other statutes of limitations. The "absence" here intended is obviously, from the context, such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of the military courts; that is, absence from the United States.

The "other manifest impediments" referred to in the statute as being such as have prevented the offender from being amenable to justice, are such impediments only as operate to prevent the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of a civil court for crime, and the like. This seems to me to be the sensible and proper construction of the article. It is the construction which has been frequently given to it by the executive department. 1 Op. Att'y Gen. 383; 13 Op. Att'y Gen. 462; 14 Op. Att'y Gen. 52; *Re Harris*, Id. 265. Nor, as it seems to me, can the whole effect of the limitation be taken away on the theory that the desertion may be considered for some purposes to be a continuing offence. The offence was complete February 22, 1872, for the purpose of this article, and, indeed, in the return, that is alleged to be the time when the offence was committed for which the prisoner is now held.

Upon the undisputed facts of the case, there was neither absence nor other impediment to his prosecution, within the meaning of the statute. The prisoner has at all times been within the jurisdiction and amenable to justice, if the charge against him is true. Therefore he is entitled to be discharged. The facts are such that, if brought to trial, he cannot possibly be found guilty or punished by court-martial for the desertion. If, on the facts, a question could arise whether the prisoner had, as a matter of fact, been absent from the jurisdiction, or, by reason of other impediment, had not been amenable to justice, then it might, perhaps, be the proper province of the military court and not of this court on *habeas corpus* to determine that question. But the fact not being disputed that he has resided in the city of New York continuously ever since his desertion, the court-martial has nothing to try, and his arrest for this cause is illegal.

Petitioner discharged.

NOTE. Notice has been filed in the United States circuit court of an application to be made by the military authorities of Governor's Island, through the judge advocate general, to Judge Blatchford for an appeal against the above order.

WOOD, Ex'x, v. WRIGHT, Assignee.

(Circuit Court, D. Indiana. —, 1880.)

1. ASSIGNEE IN BANKRUPTCY — JUDGMENT CREDITOR. — An assignee in bankruptcy has a prior equity to a judgment creditor, where, under adverse proceedings, and through superior diligence, he has acquired land from the *bona fide* purchaser of the bankrupt's voluntary grantee.

In Equity.

DRUMMOND, C. J. This is a bill filed to determine the priority of lien between the plaintiff and the assignee of the bankrupts to a certain tract of land in Wells county, which originally belonged to one of the bankrupts, J. B. Julian.

The facts out of which the controversy arise are substantially these: Julian sold the land to the other bankrupt

who sold it to Eliza Bryant on the eighth of August, 1876. These sales, it is admitted, were without consideration, and the last grantee held the property subject to the rights of creditors. A few days after the property was sold to Eliza Bryant, this plaintiff recovered a judgment in this court against the Julians, upon which there is a balance still unpaid. In September, 1876, the Julians were adjudged bankrupts.

After all this had taken place, Jesse Cate loaned \$1,000 to J. B. Julian, and in order to secure it he caused Eliza Bryant to transfer this property to Cate, and Cate made an agreement to reconvey it to Eliza Bryant upon the payment of the loan. Cate had no notice that Eliza Bryant held the property without a consideration. He therefore was a *bona fide* mortgagee of the property. It was conveyed to him by an absolute deed.

After this had occurred, the assignee brought suit in this court against Cate and the Messrs. Julian and Mrs. Bryant, to have the claim of Cate to the property set aside; or, if that could not be done, to have a judgment entered against the Julians for the value of the property; and the court held that Cate was an innocent purchaser, or grantee, and was entitled to protection; and that the Julians and Mrs. Bryant were liable for a certain amount, on which the court decided judgment should be entered against them; although judgment was not, in fact, then rendered, the court only giving an opinion on the points in controversy.

Subsequently, J. B. Julian made a proposition to the assignee to this effect: that no judgment should be entered in this court in the suit, and that he would procure for the assignee a good title to the property still held by Cate, to which proposition the assignee assented, providing it would meet the approval of the court, and that approval was given. Thereupon J. B. Julian caused a deed to be made by Martha Julian, of lands which she owned in Jasper county, to Cate, as security for the debt due to him in place of the land which he held by grant from Mrs. Bryant. That being done, Cate executed a quitclaim deed to Mrs. Bryant for the Wells county

land—the land now in controversy. The deed was delivered to Julian. It does not appear that Mrs. Bryant had any knowledge of this, but she also executed a quitclaim deed to the assignee, and delivered the same to Julian. Martha Julian and J. B. Julian also executed a quitclaim deed to the assignee.

Mrs. Wood was not a party to the suit pending in this court, and it is said the assignee had full knowledge of her judgment. Mrs. Wood caused an execution to be levied on the lands under her judgment, and the question is which has the better equity, the assignee or Mrs. Wood. I think the assignee has.

It seems to me, under the circumstances of the case, that the assignee must be remitted to the rights of Cate. Cate was the *bona fide* purchaser of the property, and held it relieved from the lien which undoubtedly existed on the part of Mrs. Wood prior to that time to the lands of Julian.

The lien against land held fraudulently from the owner must certainly cease to operate when it is transferred to a *bona fide* purchaser. That Cate was so, was held by this court. And, when the assignee has obtained his title under circumstances like these, it seems to me that he stands in the position of a *bona fide* purchaser, and is entitled to the protection of a court of equity. But, independent of this consideration, and admitting that there were equities alike on the part of Mrs. Wood and of other creditors of the bankrupts, still it seems to me that the assignee, by the superior diligence he has exhibited by suing the Julians and Cate, and, as the result of that litigation, having obtained a title to the property, should have the protection of a court of equity in preference to Mrs. Wood.

The bill of the plaintiff will be dismissed.

***In re* NEW BRUNSWICK CARPET CO., Bankrupt.**

(District Court, D. New Jersey. October 25, 1880.)

1. **BANKRUPTCY ACT, § 5081 — CLAIM — MISTAKE.**—Section 5081 of the bankrupt act provides that the court "shall reject all claims not duly proved, or where the proof shows the claim to be grounded in fraud, illegality, or mistake." *Held*, in construing this clause, that, in the absence of fraud, it was competent for the court to correct any mere mistake, and to allow the proof to stand for any sum that, upon examination, was found to be actually due.
2. **EVIDENCE—CHECK.**—A check is no evidence of a loan of money from the drawee to the drawer.
Fletcher v. Manning, 12 M. & W. 571.
3. **SAME—MORTGAGES.**—Certain void mortgages *held* evidence, in this case, of the amount of an indebtedness of a bankrupt debtor.

In Bankruptcy. On petition to expunge claim of the State Bank of New Brunswick.

R. Wayne Parker, for assignee.

A. V. Schenck, for state bank.

NIXON, D. J. On the fourth day of March, 1874, the State Bank of New Brunswick, by G. R. Conover, cashier, filed a proof of debt against the above-named bankrupt corporation, amounting, in the aggregate, to \$667,351.75, being the balance alleged to be due to the creditor corporation for moneys paid at the request of the bankrupt on certain checks, notes, and acceptances made and given by the carpet company to the bank, and including the sum of \$6,458.63 for interest from August 30, 1873, to October 22, 1873. On the twenty-sixth of June, 1876, Elias W. Miller, assignee of the bankrupt corporation, presented to the court a petition setting forth, in substance, that the claimant had improperly charged to the New Brunswick Carpet Company items of indebtedness aggregating \$198,444.32, which were not chargeable against the bankrupt, and not sustained by the exhibits and vouchers submitted in support of the claim; and had omitted and not included in said proof of debt and statement accompanying the same a number of items, amounting to \$638,843.95, for which the bankrupt should have been credited in its dealings

and transactions with the creditor; and praying that the proof of debt might be disallowed and expunged from the list of claims filed with the assignee.

An answer to the petition was filed by the bank on the seventh of August following, and thereupon a reference was made, by consent, to William Patterson, Esq., a United States commissioner, for the taking of testimony. A large amount has been taken, of extraordinary character, exhibiting such gross irregularities in the method of transacting business by the principal officers of the respective corporations that it is doubtful whether the parties themselves would be able to determine with any accuracy how the accounts stand between them; much less can strangers, however anxious to arrive at the truth, come to any satisfactory conclusion.

In the proof of debt, as originally filed, the claimants charged the bankrupt corporation with the sum of \$2,105,043.21 as the gross sum alleged to have been furnished by the bank to the carpet company during the years 1872-3, and they credited the bankrupt with \$1,444,150.08 as the amount that had been paid during the same time—charging that the difference between these sums was the amount remaining due to the bank on the thirtieth day of August, 1873.

The assignee, in his petition, insists that the exhibits and vouchers accompanying the claim do not substantiate it, but, on the other hand, that the charge of \$2,105,043.21 is \$198,444.32 in excess of the sum properly chargeable against the company; and that \$1,444,150.08 is \$638,803.95 less than the real amount for which the company should be credited in its dealings and transactions with the bank. It is the province of the witnesses and the duty of the court, from the testimony, to reconcile, if possible, these widely-conflicting claims. There is no difficulty about the principle which should govern the court in determining the case. These corporations are to be held responsible for the acts of their officers so long as they are within the line of the business entrusted to them. But when they use their official position merely as a cloak for their personal ends,—both parties knowing that the respective corporations can have no

interest and derive none from their irregular transactions,—the moneys advanced or paid, on the one side or on the other, are not properly chargeable to the institutions which the dishonest officials represent. Expert accountants have been employed by both parties. It is to be lamented that the expert for the assignee died before the court could derive any benefit from his investigation of the transaction in controversy.

On the other hand, the expert of the bank has testified so fully, and given such plausible reasons for his opinions, that the claimants seem quite disposed to rest their claim upon his testimony alone.

On the argument the learned counsel for the assignee insisted—

1. That by the provisions of section 5081 of the bankrupt act the whole claim should be rejected.

The reason assigned was that the proof of claim, as originally filed, contained items which the claimants subsequently acknowledged were a mistake, and the section provides that the court "shall reject all claims not duly proved, or where the proof shows the claim to be grounded in fraud, illegality, or mistake." The phraseology of the section is strong, and doubtless authorizes the court to reject the claim on any of the grounds stated. But I have always, in practice, construed the clause to mean that, in the absence of fraud, it was competent for the court to correct any mere mistake, and to allow the proof to stand for any sum that, upon examination, was found to be actually due.

It was further insisted by him—

2. That, in the absence of proof to the contrary, the payment of checks by a bank was always presumptive that the drawer had funds deposited for their payment.

This proposition will hardly be controverted. It is well settled that the mere paying and holding a check is no evidence of a loan of money by the drawee to the drawer, because the legal presumption is that such payment is only a return of funds which had been before deposited by the drawer. Story on Prom. Notes, 641; Parsons on Bills, 83; *Fletcher*

v. Manning, 12 M. & W. 571; *Lancaster Bank v. Woodward*, 18 Pa. St. 361; *Bunting v. Allen*, 3 Har. (N. J.) 300.

The case of *Fletcher v. Manning*, *supra*, was a proceeding in bankruptcy, and is directly in point. In proof of the petitioning creditor's debt, checks were produced by the creditor, and a clerk was called who testified that when the checks were paid by the banker the bankrupt's account was largely overdrawn. But the court said the proof did not go far enough, and held that a check presented and paid was no evidence of money lent or advanced by the banker to the customer; that, on the contrary, it was *prima facie* evidence of the repayment, to the amount of the check, by the banker to the customer of money previously lodged by the customer in the banker's hands.

When it is claimed that a check has been paid without funds antecedently deposited to meet it, the burden is upon the payee to show it, and no implied promise is raised to redeem the check until the fact is clearly proved. In the present case the claim of the bank is founded upon alleged overdrafts by the carpet company, and a large number of checks is brought forward by the bank to establish such allegations. The law casts upon the claimant the burden of showing it by satisfactory evidence. How is it attempted to be done? By the production of the checks, and by the account of the bankrupts with the bank, as it appears upon the books of the respective parties. But in view of the peculiar relations which the cashier of the bank and the president of the carpet company sustained towards each other, and in view of the weight of the testimony that the books were subject to their control and manipulation, and do not reveal the real transactions of the parties, I am unwilling to admit to proof any claim supported by any such evidence. I have great respect for the evident candor, honesty, and good intentions of the expert witness Burke, who has given so much labor to unravelling the tangled thread of the dealings of these men. He has probably done as well as any one could do with the material he had to work with, but it is quite clear that the accounts on which he mainly relies for his conclu-

sions are not to be trusted, and that entries were made to conceal, rather than to show, the actual transactions of the officers of the respective companies. Under these circumstances I am satisfied that it is safer for the ends of justice, and better for the rights of the creditors of the two bankrupt corporations, that I should allow matters to stand as I find them, than to transfer from one to the other so large a sum of money upon such unreliable evidence.

But whilst I have this difficulty in regard to the allowance of the claim as proved, there are facts exhibited which convince me that the carpet company is largely the debtor of the claimants. When it was put into bankruptcy the bank was the holder of two mortgages that it had received from the company—one for a little less than \$100,000, being a mortgage that one I. T. Rowand had given to the carpet company upon lands in Pennsylvania, to secure the payment of certain promissory notes that he had made on the purchase from the company of \$100,000 worth of its capital stock, and which had been assigned to the bank as collateral security for the payment of the said Rowand's notes, which the bank had discounted for the company; and the other, a mortgage executed by the carpet company to the bank on its real estate, fixtures, and machinery in New Brunswick, in pursuance of a resolution of the board of directors passed September 2, 1873, and given to secure the payment of other notes which the bank had discounted for and was holding against the company. As both of these mortgages had been received by the bank within four months of the filing of the petition of bankruptcy against the debtor company, and were taken to secure antecedent debts, at a time when the creditors had reasonable cause to believe that the company was insolvent, the authorities of the bank surrendered them to the assignee in bankruptcy, as they were advised they were required to do before they could prove their claim. Is not such action on the part of the managers of the carpet company a clear confession of indebtedness, at least to the amount of these mortgages, and does it not afford a safer ground to stand upon than any evidence of books of account,

which had been made the vehicles of false information by the acts of dishonest officials? That is my judgment. The proof of claim, as made, must be rejected; but the receiver of the bank will be allowed to make proof for the amount of the Rowand notes which was held by the institution at the surrender of the Rowand mortgage, and which had been discounted for the carpet company, and also for the principal of the mortgage executed by the company to the bank in pursuance of the resolution of the second of September, 1873.

In re DUFF, Bankrupt.

(District Court, S. D. New York. October 14, 1880.)

1. **BANKRUPT ACT—"PRINCIPAL DEBTOR"—COLLATERAL BOND—SURETY.**—A bankrupt is not liable as "principal debtor," within the meaning of the bankrupt act, upon a collateral bond, where it is apparent upon the face of the instrument that the obligation was incurred by the bankrupt as a surety.

In re Loder, 4 N. B. R. 190.

2. **SAME—"MERCHANT OR TRADESMAN"—THEATRICAL MANAGER.**—A theatrical manager who buys costumes, machinery, etc., for use in his business, and who on a few occasions has sold some such property, is not a merchant or tradesman within the meaning of the bankrupt act.

In re Odell, 17 N. B. R. 73, distinguished.

3. **SAME—REV. ST. § 5110, SUBD. 9—FRAUDULENT TRANSFER.**—A transfer by an insolvent debtor, for the purpose of concealing his property from his creditors, is an act done "in contemplation of becoming bankrupt," within the meaning of the ninth subdivision of section 5110 of the Revised Statutes, although the debtor did not then intend or expect to go into bankruptcy.

A transfer of certain personal property *held fraudulent*, under the circumstances of this case.

In Bankruptcy.

F. Bien and *A. Taylor*, for creditors.

J. R. Cuming, for bankrupt.

CHOATE, D. J. This is an application for the discharge of the bankrupt. The discharge is opposed on several grounds:

1. It is objected, first, that the bankrupt has not obtained

the assent of the requisite proportion of the creditors who have proved their debts, to whom he is liable as principal debtor. One Thayer has proved a debt for upwards of \$30,000. This creditor has not assented, and, if his claim is to be considered in the computation of the requisite one-third in value, this point is well taken. The question is whether the bankrupt is liable as *principal debtor* upon this claim. Thayer's proof of debt is upon a bond for the sum of \$60,000, executed by the bankrupt, June 15, 1877, to one Hill, as receiver, appointed by the court in an action against John A. Duff and others. Thayer proves as assignee of the bond. The condition of the bond is the payment of the sum of \$30,000 to the receiver, or his assigns, June 15, 1882, with interest semi-annually, "according to the condition of a bond made by John A. Duff and Rufus C. Duff, jointly and severally, to said receiver, bearing even date herewith, to which bond this is collateral." I think enough appears on the face of this bond to show that this obligation was incurred by the bankrupt not on his own account, but as surety for John A. Duff, and, therefore, that he cannot be regarded as having become indebted thereon as principal debtor. The construction of this phrase, "principal debtor," was carefully considered by this court in *In re Loder*, 4 N. B. R. 190. It was there held that an obligation as indorser, after the liability has become fixed by non-payment and notice, is not an obligation as "principal debtor," if the indorsement was for the accommodation of the maker of the note. I think the present case is within that decision. It is argued, however, that on this bond itself the bankrupt was the principal obligor,—indeed, the only obligor,—and not in the position of an indorser, who is on the face of the contract not the principal obligor. I think, however, that the distinction in the statute referred not to the form of the obligation so much as to the real relation of the bankrupt to the debt itself. Greater indulgence was intended to be extended to bankrupts in respect to obligations incurred on behalf of others than in respect to those incurred on their own account; and it seems to me to be immaterial whether the bankrupt joins in the bond of the principal debtor as a

surety, or gives his own collateral bond, which, on its face, shows that it is given by him as surety. The difference is one of form only, and not of substance. How it may be in the case supposed by the learned counsel for the creditor, of commercial paper given by the bankrupt, and which he signs as maker for the accommodation of the indorser, if proved by a holder who had no knowledge of the nature of the transaction except what the face of the paper shows, it is unnecessary to decide. In this case the suretyship appeared on the face of the instrument.

2. It is also objected that the bankrupt, being a merchant or tradesman, did not keep proper books of account. The bankrupt was a theatrical manager. It did not appear that he had any other business. He bought costumes, machinery, etc., for use in his business. It was also shown that on a few occasions he had sold some such property. I think he cannot be considered a merchant or tradesman within the meaning of the statute. The case of *In re Odell*, 17 N. B. R. 73, is relied on by the opposing creditors. That was the case of a keeper of a livery stable. He was, under the peculiar circumstances shown in respect to his business, held to be a merchant or tradesman. It was held that, in connection with his business of keeping a livery stable, he was also engaged in the business of buying and selling horses, and food for horses. The present case is essentially unlike that. I cannot find on the evidence that this bankrupt made the selling of anything a regular part of his business, as was the case in *In re Odell*. The sales that he made were isolated transactions, and not, as in *Odell's* case, within the regular scope and purview of the business he undertook to carry on.

3. It is also objected that the bankrupt, in contemplation of bankruptcy, made certain fraudulent transfers of his property to his father, John A. Duff, and to one Banvard, his landlord, with intent to prefer them as creditors, and to prevent his property from coming to the hands of his assignee, and being distributed among his creditors. The transfers thus attacked were in March, 1878. The petition was filed August 31, 1878.

These specifications, if sustained, must come within the ninth subdivision of section 5110. It appears that the bankrupt transferred to his father the principal part of his property, consisting of costumes and other implements of his trade. He was indebted at the time, aside from his obligation on the bond to the receiver, about six or seven thousand dollars, which he had no means to pay. He was indebted to his father, for money loaned, several thousand dollars. The transfer to his father was without writing. The property was of very uncertain value, being worth but a few hundred dollars, if purchased for the purpose of selling it again, but having cost about \$3,000. Yet there appears to have been no agreement with the father as to the price at which he took it. The bankrupt testifies that he had no intention of preferring his father, but transferred it to him in payment of moneys loaned. He testified that the reason why it was transferred to him rather than to anybody else was that he was the nearest person being at hand in the theater; that his father was not pressing him for money, and that the transfer was made at his own suggestion. He also testifies that he had no thought at the time of going into bankruptcy. But upon all the evidence, and considering the very suspicious circumstances attending the sale, I can find no adequate motive for it except to protect the property from his creditors. With this purpose there may also have been an intention at the same time to secure or prefer his father.

The fact that the bankrupt, then, did not intend or expect to go into bankruptcy, if he is to be credited in that respect, does not relieve the act from being considered an act done "in contemplation of becoming bankrupt" within the meaning of the statute. That expression means, as has often been held, in contemplation of committing an act of bankruptcy. Such a transfer is in itself an act of bankruptcy, if made, as this appears to have been, with intention to cover up his property from his creditors, and to prevent its distribution among them. He claims to have had great expectations of success with a play to be presently brought out. Over-sanguine hope of better business may sometimes justify great present sacri-

fice of property or the continued payment of debts by one who is really insolvent, but cannot excuse, under the bankrupt law, the actual withdrawal and concealment of property by an insolvent debtor, under cover of a transfer such as this, which was also in fact intended to hinder, delay, and defraud his creditors. It is unnecessary to consider the further charges as to the transfer to Banvard. The specification of a fraudulent transfer to John A. Duff is sustained, and on this ground the discharge must be refused.

In re KRAFT and others, Bankrupts.

(*District Court, S. D. New York. ———, 1880.*)

1. **BANKRUPTCY—FRAUDULENT PREFERENCE.**
2. **SAME—BOOKS OF ACCOUNT.**
3. **SAME—GENERAL ASSIGNMENT.**—The intent to have the debtor's estate wound up and distributed under a general assignment, by an assignee named by the debtor, constitutes an intent to prevent the property from coming to the assignee in bankruptcy, and of being distributed under the bankrupt law.
Platt v. Preston, 19 N. B. R. 244.
In re Goldsmith, 3 N. B. R. 164.
In re Kasson, 18 N. B. R. 379.

In Bankruptcy.

Jos. S. Bosworth, Jr., for bankrupt.

Ralph E. Prime, for creditors.

CHOATE, D. J. This is an application for the discharge of Frederick W. Kraft, one of the bankrupts. The bankrupts constituted the firm of Beaman & Kraft, and carried on the business of leather dressers down to about the fourth day of January, 1876, when Beaman absconded and Kraft executed a general assignment for the benefit of creditors, without preferences. The estate of the copartnership was distributed under that assignment, and the remaining debts are chiefly the balances of the firm debts still unpaid. The petition of

Kraft for the adjudication of the firm was filed August 10, 1878.

Of the specifications filed by the contesting creditors they now rely on three only: *First*, the transfer of certain skins to a creditor, Goodenough, shortly before the making of the general assignment, with intent to prefer him; *second*, the failure to keep proper books of account, and especially in that the bankrupts kept no cash account; and, *third*, the making of the general assignment in contemplation of bankruptcy, and with intent to prevent the property from coming to the hands of the assignee in bankruptcy and being distributed under the bankrupt law.

1. The transaction with Goodenough was not a fraudulent preference, upon the evidence, so far as Kraft was concerned. He then believed the firm to be solvent and able to go on in business and pay all its debts.

2. The books which remained after Beaman absconded were not proper books within the meaning of the statute. But, upon the evidence, it is clearly proved that there was another book kept by him and which disappeared with him. And the evidence is, I think, sufficient to show that this book contained the cash transactions of the firm; that it was kept by Beaman as one of the firm books; and that the entries made in it supplied what was wanting in the other books to constitute them all together proper books of account.

3. In respect to the general assignment it is insisted on behalf of the bankrupt that it was not made in contemplation of becoming bankrupt, or for the purpose of preventing the property from coming into the hands of their assignee in bankruptcy, and of being distributed under the bankrupt law in satisfaction of their debts.

It has been too often held, in this district and circuit, that the intent to have the debtor's estate wound up and distributed under a general assignment, by an assignee named by the debtor, constitutes an intent to prevent the property from coming to the assignee in bankruptcy and of being distributed under the bankrupt law, to leave this an open question in this court. *Platt v. Preston*, 19 N. B. R. 244, and cases cited; *In*

re Goldsmidt, 3 N. B. R. 164; *In re Kasson*, 18 N. B. R. 379. It has been doubted whether it is not competent to show that the actual intent of the debtor in making the general assignment was not to have his estate wound up and distributed, but to make it subserve some temporary purpose not inconsistent with an intent to have the property afterwards pass to an assignee in bankruptcy and be distributed under the bankrupt law. *In re Seeley*, 19 N. B. R. 12. The authorities cited above are, perhaps, against the competency of any such evidence; but in the present case it is unnecessary to decide the point, because, upon the whole testimony, I think it is clear that when the bankrupt Kraft executed the general assignment he intended and expected that the estate of the copartnership would be wound up under it. That purpose is certainly strongly shown upon the face of the assignment, and neither his own testimony as to his purpose, nor the testimony in respect to his contemporaneous declarations, shows anything to the contrary. It is true that he testifies that at a meeting of the creditors after the execution of the assignment a question arose between him and his creditors as to what was to be done, and it was determined that the estate should be distributed under the assignment. I do not perceive that this alters the case. It does not appear what else anybody proposed to do. This transaction is not inconsistent with a purpose on his part, at the time of the execution of the assignment, to have its provisions carried into effect. His conversations, as testified to by other witnesses, and partially, also, as testified to by himself, show that at the time of executing the assignment, his partner had absconded, and the firm was insolvent, and that the assignment was resorted to for the purpose of distributing the estate among his creditors. Any mere use of the assignment as a temporary device is inconsistent with his conversations with Mr. Vail, the president of one of the contesting banks, and Mr. Fowler, the assignee, and Mr. Sanders, who drew the assignment.

The amendment to the bankrupt law passed July 26, 1876 which provides that a general assignment, made in good faith and without preferences, and valid according to the

local law, shall not prevent a discharge in involuntary cases, strongly confirms the views of the court above referred to and followed, as to the effect of such a general assignment in preventing a discharge in a case of voluntary bankruptcy like the present. It is immaterial that the bankrupt, before making the assignment, consulted with some of his creditors and was advised by them to make an assignment. So far as these opposing creditors are concerned, the evidence shows that before he consulted them he had already determined to make an assignment; nor did they do any act, by advising him or otherwise, which should preclude them from insisting on this objection to his discharge.

The sixth specification is therefore sustained. The others are overruled as not proven.

Discharge refused.

In re CHISHOLM and others, Bankrupts.

(*District Court, S. D. New York.* ———, 1880.)

1. ASSIGNEE IN BANKRUPTCY—ATTACHMENT.—Money in the hands of an assignee in bankruptcy cannot be reached by attachment.
In re Cunningham, 19 N. B. R. 276.

In Bankruptcy.

J. A. Seaman, for petitioner.

W. F. Scott, for assignee.

E. R. Olcott, for Planters' National Bank.

CHOATE, D. J. This is an application for an order on the assignee to pay a dividend to the petitioner, who, by order duly made, has been subrogated to the rights of a creditor whose debt has been, after contest, established as proved. The answer of the assignee shows that before the dividend was actually declared, but after the meeting at which it was declared was called, he was served with a warrant of attachment against the original creditor, issued by a state court, in an action brought against that creditor by the Planters' National

Bank of Augusta, Georgia, upon a judgment recovered in the circuit court of the United States for the district of South Carolina. The assignee declined to pay the dividend to the petitioner without a special order of the court. In the case of *Kohlsaat*, 18 N. B. R. 570, it was held that the payment of moneys, payable under a composition in bankruptcy, could not be interfered with by proceedings in a state court. In the case of *Cunningham*, 19 N. B. R. 276, the question whether dividends in the hands of an assignee can be attached, was very carefully examined by Judge Love, and it was held that they could not be attached even after the dividend was declared. The case of *Dunlap v. Ins. Co.*, 74 N. Y. 145, seems not inconsistent with these cases. The petitioner is entitled to the order on the ground that the money in the hands of the assignee could not be reached by attachment.

Motion granted.

JOSEPH DIXON CRUCIBLE CO. v. BENHAM.

(Circuit Court, D. Connecticut. November 22, 1880.)

1. TRADE-MARK—WRAPPERS AND LABELS—STOVE POLISH.

In Equity.

Morris W. Seymour, for plaintiff.

H. C. Baldwin, for defendant.

SHIPMAN, D. J. This is a bill in equity, brought by a citizen of the state of New Jersey against a citizen of the state of Connecticut, to restrain the defendant from the use of the plaintiff's trade-mark, and for an account. The trade-mark had never been registered in pursuance of any act of Congress.

Joseph Dixon commenced the manufacture of stove polish in Taunton, Massachusetts, at least as early as in the year 1840, and was engaged in the business until 1868, either alone or as a member of the firm of Joseph Dixon & Co. He

removed to Jersey City, in the state of New Jersey, about the year 1849. The plaintiff corporation was formed in 1868, and has been continuously manufacturing said article to a large extent.

At a certain time during the period (the precise time being the only matter in dispute) Mr. Dixon commenced to put up his stove polish in elongated cubes, wrapped about by a blue paper wrapper, with printing thereon in black ink, surrounded by a heavy, double black rule or border. The ends of the wrapper were held in place by a yellow label covering the ends of the cube, with printing thereon in black also, surrounded by a double black rule. The same form, style, language, and appearance of the cube, wrapper, and label have been continued to the present time, except that the word "prepared" was substituted for "pure" in the year 1851 or 1852, and the necessary changes of the name of the manufacturers have been made. *Fac similes* of the present styles of wrapper and label, with the printed matter thereon, are given in the bill.

The answer denies only the priority of the use of the trade-mark by the plaintiff. Slight evidence of the truth of the allegations, which were not denied, was given by the plaintiff; but it may be considered as proved that large amounts of money have been spent by the plaintiff and its predecessors in the manufacture of the article contained in this kind of wrapper; that the article has attained an established and high character, and that its form and appearance are well known to the public. The wrappers and label, and the arrangement of the printed characters, and the language of the wrappers and labels, have become a well-known trade-mark, indicating to all purchasers that the article which is contained in the wrappers is the Dixon polish, and is made by the plaintiff. The good-will of the business, and the right to the exclusive use of the trade-mark, are valuable to the plaintiff. Joseph Dixon duly and legally assigned and transferred all his rights in the trade-mark to the plaintiff.

The defendant, a manufacturer of stove polish, under the name of the New England Lead Works, has, since 1876 or

1877, put up his article in wrappers and labels almost identical in appearance, arrangement, style of printing, and language with the plaintiff's wrappers and labels, except the necessary changes of name and address. It is not denied that the two wrappers and labels are substantially identical. The question in the case is as to priority of use. The defendant contends that he has continuously used substantially the same form and style since 1853, and that the adoption of this style by Mr. Dixon was after that date.

The plaintiff's theory is that it has satisfactorily shown that Dixon commenced the use of this trade-mark at least as early as 1847. The defendant's theory is that he commenced the manufacture of stove polish in the year 1844, and that in 1853, and before Dixon's use of the wrapper, he began to put up his article in elongated cubes, in a blue wrapper, with a yellow label, under the name of the Straitsville East India Lead Works; that, with the exception of the years between 1863 and 1867, when he was engaged in other business, he continued the use of these wrappers and labels until 1876 or 1877, when he changed to the present style, and adopted the name of the New England Lead Works, and inserted his own name as proprietor.

Mr. Benham has kept a country store in Straitsville, a village in the town of Naugatuck, and has had from \$500 to \$1,000 invested in the stove-polish business. It is manifest that the bulk of the product having the "East India" label was sold to peddlers, as this article was not known to the trade. He testifies, in answer to the question "Who composed the printed matter on your first label on the cube?" "I am not certain; I think Giles (Josiah Giles, a printer in Hartford) got the label up. I left it with him to get the label up. It was either him or a man named Hurlburt."

He further testifies, in substance, that this wrapper was used till 1876 or 1877, when he changed to the New England Lead Works wrapper. The printing was done by the Waterbury Printing Company. In answer to the question, "Did you send them a copy from which you instructed them to print a certain number of labels?" he said: "I do not know

whether I took up one of Exhibit A, (the East India wrapper,) or sent them one when I made the change; that is, whether I took up a package like Exhibit A, or took up a label or sent them one."

It is clearly proved that in the latter part of 1876 the Waterbury Printing Company made for the defendant as near an imitation of the plaintiff's wrapper and label as was possible, with the necessary alteration of names, and that the Dixon trade-mark was furnished by some one to the printing company for that purpose. Indeed, it is manifest from a comparison of the two wrappers that one was copied from the other. There is not so close a resemblance between the "East India" and the Dixon wrapper as there is between the latter and the wrapper of the New England Lead Works. The "directions" are entirely different. But it is apparent, from reading the descriptions of the polish which are printed on each wrapper, that the two had but one author; they are almost identical. Did Dixon copy from Benham, or did Benham copy from Dixon? It is sufficiently established that Dixon commenced the use of his wrapper as early as in 1848. Benham does not claim to have commenced until 1853. I have no doubt that the mind and the hand which prepared the Benham wrapper for the press in 1853 used the Dixon wrapper as a pattern, and that there was a conscious attempt to imitate the form in which the successful article had been presented to the public. It did not appear that the plaintiff was chargeable with laches after it discovered the defendant's wrappers and labels.

Let there be a decree for an injunction against the use or imitation, colorable or otherwise, of the plaintiff's wrappers, labels, or trade-mark, and for an accounting.

SLAWSON v. GRAND STREET, PROSPECT PARK & FLATBUSH
RAILROAD CO.

(Circuit Court, E. D. New York. ———, 1880.)

1. RE-ISSUE No. 4,240, for an improvement in fare boxes, *held void* for want of invention.
2. INVENTION—COMBINATION—FARE BOX.—The mere addition of a window to a well-known style of street-car fare box, so arranged that a passenger by looking through it can see the fare deposited by him, does not constitute an invention within the meaning of the patent laws, where such box previously had a window so arranged that the driver could see the fare when deposited by the passenger.
Hailes v. Warner, 20 Wall. 354.
3. PATENT No. 121,190, for an improvement in fare boxes, *held void*, for want of invention.
4. INVENTION—COMBINATION—FARE BOX.—The combination of a street-car fare box with the head-lamp of a car and a reflector, in such a manner that the light from the lamp will be thrown into the fare box, does not constitute invention.

In Equity.

George Gifford, for plaintiff.

P. S. Crooke, for defendant.

BENEDICT, D. J. This is a suit in equity brought to recover damages by reason of an alleged infringement by the defendant of two certain patents owned by the plaintiff. One of these patents was issued to the plaintiff July 28, 1857, for an improvement in fare boxes. It was re-issued May 4, 1858, again re-issued January 24, 1871, and is now known as re-issue No. 4,240, extended for the term of seven years from the twenty-eighth day of July, 1871. The other patent sued on is also for an improvement in fare boxes, granted to Elijah C. Middleton, assignee of James F. Winchell, December 2, 1871, numbered 121,920, and on the seventeenth of April, 1873, assigned to the plaintiff. The defendant denies the infringement, and also disputes the validity of the patents sued on.

The questions raised in respect to the Slawson patent, No.

4,240, will be first considered. The patent contains two claims, in the following language:

"First. A fare box, composed of two compartments so combined that the fare, on being deposited through an opening in one of them by the passenger, without the intervention of the driver or conductor, shall be temporarily arrested therein for examination or inspection by the driver or conductor, through an opening therein covered by a transparent medium, and then, when approved of, transferred directly to the second or general receiving compartment, which, as well as the first, is made inaccessible, except by violence, to the driver or other unauthorized person, for the purpose set forth.

"Second. A fare box having two compartments, into one of which the fare is first deposited, and temporarily arrested, previously to its being deposited in the other, when the former is provided with openings covered or protected by transparent mediums or devices so arranged that the passenger can see through one, and the driver or conductor through the other, in the manner substantially as and for the purposes set forth."

Subsequent to the extension of this patent, and on September 6, 1877, the patentee filed a disclaimer in which he sets forth that through inadvertence, accident, or mistake the specification or claims of the said letters patent are too broad, including that of which the said patentee was not the first inventor, and thereupon he enters his disclaimer to that part of the claims in said specifications which constitutes the first of the claims above set forth. The effect of this disclaimer was to limit the invention to a fare box composed of two compartments, where the compartment into which the fare is first deposited is provided with two windows so arranged that the passengers can see through one, and the car driver through the other.

It will be observed that no claim is made to any particular device by which the fare when deposited is temporarily arrested before passing into the lower compartment, nor to any form of opening in the box, nor to any particular locality for

the windows, provided only they are so arranged that the passengers can see through one and the driver the other.

It must also be observed that the first claim described a fare box similar in all its respects to the fare box described in the second claim, with the single exception that it contained but one window, so arranged that the driver could see through it. And such a fare box the disclaimer asserts was known prior to the plaintiff's invention. It is apparent, therefore, that the only novelty in the plaintiff's invention, as it now stands described in his patent, consists in the additional window, so arranged that a passenger by looking through it can see the fare deposited by him. The question, therefore, at once arises, whether the addition of such a window to a known style of fare box, having a window arranged so that the driver can see the fare when deposited by the passenger, constitutes an invention within the meaning of the patent laws.

The view taken in behalf of the plaintiff is that the claim is for a combination consisting of certain old elements and one new element, namely, the additional window.

But no new result is accomplished by the introduction of the additional window in the fare box. The fare is deposited as before, and reaches its final destination in precisely the same way as before, without acceleration, detention, or deviation. The only distinction between the old and the new box is that in the old box the fare, in its passage from the passenger to the lower compartment of the box, passes by one window, while in the plaintiff's box it passes by two windows. This distinction does not constitute a difference in the result. The additional window, it is true, permits the transmission of light through a part of the box, where before it could not pass. But it accomplishes this result without aid from any other part of the machine, and in so doing it in no way modifies the operation of any of the other parts. There is, in fact, no joint operation, and the case is one of simple aggregation, not combination. Furthermore, all that the plaintiff did was to duplicate one of the features of the machine. Some convenience, doubtless, resulted from this duplication,

but the effect produced by the additional window was the same in kind as that produced by the existing window, and accomplished in the same way. There was no patentable matter in the discovery that it would be more convenient to have light transmitted through the box in another place, and I am unable to see that any invention was required to accomplish that result by adding another window.

In order to constitute a patentable combination, the result must be some effect different from the effect of the separate parts, and produced by the combined forces. A new result must arise from the reunion of the elements of the combination, and not simply from the separate action of each element. So the law has been declared in numerous cases, and no different rule is contended for in this case. The difficulty in this, as in most cases of this description, is not in regard to the rule of law, but in applying the rule with proper discrimination to the facts of the particular case. It is not, therefore, to be expected, in controversies of this character, that any prior adjudged case can be found so similar in its facts as to furnish a direct authority one way or the other.

But, in this instance, there is one prior adjudged case so very similar to the one in hand, that it may very well be said to compel the conclusion that this patent is void. I refer to the case of *Hailes v. Van Wormer*, 20 Wall. 354. That was the case of a base-burning stove having two chambers, in one of which the coal is first placed, and whence it descends to the other and is there consumed. One claim of the patent was for the construction of an "illuminating window" in one of the chambers, in combination with certain other designated parts of the stove. The "illuminated window" was an opening in the stove covered with mica. The other parts of the stove were already known in combination, and the court says: "It is impossible to regard the mere addition of such openings to a stove, containing the improvements described in the re-issued patent, as the formation of a new combination. It is not invention." In that case the rest of the stove was old, as here the rest of the fare box is conceded by the disclaimer to be old. In that case, as here, the additional element was

an opening covered by a transparent medium. In that case the object of the opening was to enable the coal which passed from the upper to the lower compartment of the stove to be seen through the opening. In this case the object of the opening is to enable the fares which pass from the upper to the lower compartment of the fare box to be seen through the opening. There such openings were a well-known device applied to stoves. Here a similar opening was employed for the same purpose, in the fare box admitted to be old. In this case, therefore, as in that, it must be said that it is impossible to regard the mere addition of such an opening to a fare box, conceded to be old, as the formation of a new patentable combination. It is not invention.

There remains to consider the second patent upon which the plaintiff relies in his bill. This patent was issued to Elijah C. Middleton, assignee of James F. Winchell, dated December 12, 1871, and is also a patent for an improvement in fare boxes. The specification states that "the improvement relates to the mode of illuminating the interior of a fare box in street railway cars or other vehicles when used during the night, and it consists in the construction of the fare box with suitable openings and reflectors, arranged and adapted to receive light from the ordinary head lamp placed above the fare box."

The claim is as follows: "What I claim and desire to secure by letters patent is lighting the interior of a fare box at night by light obtained from the head light of the car, thrown by the reflector, I, through an opening, H, in the head-lamp box, into the chamber, for the temporary detention of the fare for inspection, substantially in the manner and for the purpose set forth."

The contention on the part of the plaintiff is that this is a claim for a combination of certain old elements,—viz., (1,) a fare box with an opening at the top covered by glass or other transparent substance; (2) the head lamp of a car; (3) a reflector,—in such a manner that a part of the light from the head lamp shall be reflected upon the platform of the fare box. Assuming the claim to be for a combination,

the only novelty pretended consists in the arranging the fare box, lamp, and reflector in such a manner that light from the lamp will be thrown into the fare box. No invention was required to so arrange these parts. It would not fail to be accomplished by any person of ordinary intelligence and experience who should attempt it.

This patent, therefore, must be held to be void. The result is that the bill is dismissed, with costs.

AMERICAN WHIP CO. v. HAMPDEN WHIP CO. and others.

(Circuit Court, D. Massachusetts. ———, 1880.)

1. RE-ISSUE No. 5,651, for an improvement in the modes of constructing whip-stocks, *held valid* as to the first claim, *held anticipated* as to the second claim.

In Equity.

Patent No. 132,909 was granted David C. Hull, November 12, 1872, on an application said to have been filed March 9, 1871, for an improvement in modes of constructing whip-stocks. In his specification he said: "In the common way heretofore practiced for making a whip-stock of pieces of rattan and a metallic load, the pieces of wood were arranged around the load-piece, with their butts even, or about so, with each other, in consequence of which the part at the butt of the stock held or grasped by the chuck of the turning machine could not be turned thereby, but had to be subsequently reduced by other means." He then described the mode of making his improved whip-stock, showing, with the assistance of his drawings, substantially this: that he inserted a plug or backing of wood in the butt of the whip-stock, at the part which is grasped by the chuck of the lathe, in place of the metallic load-piece, so that when the stock is taken out of the machine this part can be sawed off without obstruction from the iron or leaden load-piece, instead of being planed or whittled down to suit the taper of the whip. He adds: "I

am aware that in turning an article it has been customary to use a blank longer than the article, and afterwards to remove the surplus at each or either end of the article. Such, however, constitutes no part of my invention, but is only incident to it in the matter of reduction of it or [?] to the whip-stock. I therefore make no claim to such a process of turning an article from a blank longer than the article, and subsequently removing the surplus at either or each end of the article." The claim was "the method of constructing a whip-stock by making a stump-shod on the end of the stock by the insertion of a backing or plug within the surrounding rattans, for the purpose of allowing the butt of the whip to be entirely finished by turning, and the superfluous material to be removed by the saw, all in the manner described."

Re-issue No. 5,651 was granted the patentee, November 11, 1873, in which the description of the manufacture was like that in the original patent, but a statement and a claim were added. The former is: "The extension of the rattan strips, D, rearward beyond the load-piece, with or without the plug or prism, is a matter of my invention. Although the extension alone, without the load-piece, makes a stump-shod which can be used in holding the stock in the chuck of the turning machine, the addition of the plug makes the stump-shod stronger, and not liable to cripple or give way under the action of the machine." The additional claim, which was the first of the re-issue, was for a whip-stock with the parts arranged as described, showing the rattan strips surrounding the load-piece, and extended rearward beyond it, substantially as described. The second claim, like the single claim of the original patent, though somewhat differently expressed, was for the arrangement when the plug was used.

There was evidence tending to show that the invention claimed first in the re-issue was made in 1865, when about one gross of whips were made and sold; and the second part, where the plug is used, was made in 1870, within two years before the application for the original patent. There was much conflicting evidence upon the state of the art before 1865 and before 1870.

T. L. Livermore, for complainants.

B. F. Thurston, for defendants.

LOWELL, C. J. As I construe the patent, it is for an improvement in the manufacture of that class of whips which are turned in a lathe, and the whip-stock claimed is the stock just before it goes into the lathe, or an improvement in the manufacture at that part of its progress. This last point is very important, because one Herrick is proved, without contradiction, to have made whip-stocks, with a wooden plug or backing, before 1870. Herrick did not finish his whip-stocks in a lathe, though they were fit for that mode of operation, and, if the second claim of the re-issue is for a turned whip-stock, it might, perhaps, be sustained. But the claim itself declares that the arrangement is "in order that the butt of the stock may be held and finished by a turning machine," and a statement precisely like this is made in an earlier part of the specification. That claim must, therefore, be held to have been anticipated by Herrick, and to be void.

The invention mentioned in the first claim was made in 1865, and was not, in my opinion, in public use or on sale more than two years before March 9, 1871, by reason of the manufacture at Charlestown; not on sale, because neither the invention, nor anything which embodies or would be likely to suggest it, is found in the completed whip; and not in public use, because the invention was tested in the only way in which it could fairly be tested, by making a few at the factory where the patentee was employed.

The law since 1870, as I understand it, has avoided a patent, if any one has publicly used or has sold the same invention, by whomsoever discovered, for more than two years before the patent was applied for. The Herrick whip was certainly made before 1870, but I do not think it is proved to have been made before March 9, 1869. The precise date is left in much doubt.

I do not find that this invention was anticipated. Spencer's evidence as to certain kinds of whips, of which he gives reproductions, is seriously contradicted by workmen referred to by him, as well as by others; and none of the whips, if they were

made, were of the class of whips which were or could be turned in a lathe. If some of them had a backing of wood below the iron, it was not, in my opinion, the equivalent of that of the patent.

Whether the invention of the first claim was patentable, in view of the state of the art admitted in the specification, is certainly a nice question. Hull disclaims the process of turning an article so as to leave a "stump-shod" or piece to be cut off. This was done in turning the legs of chairs and other articles. I suppose he means that he disclaims any broad or general application of this mode of manufacture. As applied to a whip-stock with the peculiar benefit which it gives, and the exact application which it requires, I think, upon the whole, it may be supported as being something more than the new application of an old method. The invention does not consist either in making a "stump-shod" or in sawing it off, but in combining the metallic load-piece of a whip-stock with the stump-shod in such a way that the stump-shod may be sawed off.

I find the first claim of the patent to be valid, and to have been infringed.

Decree for the complainants.

SINCLAIR and others v. BACKUS.

(Circuit Court, D. Massachusetts. ———, 1880.)

1. PATENT No. 45,344, granted to D. M. Moore in December, 1864, for an improvement in wrenches, *held* valid.

In Equity.

LOWELL, C. J. The patent of D. M. Moore, No. 45,344, was granted in December, 1864, upon an application filed October 1, 1864, for an improvement in wrenches. The patented tool is a wrench with a double-faced ratchet-wheel connected with two pawls, which are controlled by a lever and springs. The springs tend to keep the pawls in contact with both faces

of the ratchet, and when the lever is central or out of use the pawls lock both faces of the ratchet-wheel, and leave the wrench rigid like the old form of that tool. By moving the lever to the right the pawl on that side is disengaged, and the ratchet-wheel is free to move to the right, but is rigid in the other direction, and so, conversely, when the lever is moved to the left the pawl on this side is disengaged. The claim is for "the combination in a wrench of the ratchet-wheel, B, containing the socket for seizing the work, with the detents, [pawls,] *b, b*, and lever, *g*, so constructed as to lock the ratchet against rotation in any direction, and also to lock it at will so that the implement may be worked as a right-hand or left-hand wrench without removing it from the work, substantially as described."

The defendant uses the ratchet-wheel with the spring, pawls, and lever precisely like Moore's, in a bit-stock which is adapted to receive various tools. Upon inspection I cannot doubt that one was copied from the other. The plaintiffs' expert testifies that this part of the defendant's bit-stock operates like a wrench, and that wrenches are often used to work taps, which are tools for turning screw threads. These statements are not denied, and, if true, there is no doubt that the defendant uses the plaintiffs' wrench, with additions, and infringes the patent.

There are, however, two questions of fact which affect the validity of the patent. Three witnesses declare that they used a wrench which would operate as a right or left hand ratchet-wrench, or as a rigid one; and they reproduce from memory a model which they say is substantially like it. It is true, and is creditable to them, that they do not undertake to verify the reproduction as precisely like the original. This tool is known in the record as the Coggeshall wrench, and the original has not been seen for about 20 years. Supposing the model to represent the original, the question is whether Moore made a patentable improvement upon it.

The Coggeshall tool had two wheels rigidly united, with their cogs facing different ways, two pawls with suitable springs, which made the wrench rigid when both were operating, and a rotary cam, by the action of which either pawl

might be thrown out of connection with its wheel. This wrench could be used in the three modes of Moore's, and is the only wrench before Moore's which had so great a capacity, and was at the same time wholly automatic. It had a separate wheel for each set of ratchets, instead of a double-faced wheel, and its lever or cam for moving the pawls was much inferior to Moore's, because the latter takes fixed positions, and is locked in each, while Coggeshall's might be turned too far, or might turn back, and would need constant attention to keep it in the required place. I have no doubt that these differences would make Moore's invention patentable, if Coggeshall's had been patented. Whether, when a patentee has made an original invention, which is confessedly an improvement upon all old machines, he is conclusively presumed to have known every lost and forgotten machine in the line of his art, and therefore must prove invention over the best of them, as he undoubtedly must be presumed to know of any machine which fully embodied his invention, I am not prepared to say. The patent may be held good for precisely what Moore invented, which is precisely what the defendant uses.

The other question of fact is whether Moore publicly used his wrench before the first day of October, 1862; that is to say, more than two years before he applied for his patent. Moore swears that he invented the tool in 1859, at Philadelphia, where he was then employed, and used one there openly a great many times, and afterwards at Hartford, and lastly at Windsor, his home, to which he returned about November, 1861. He was not cross-examined; why, I do not know. Witnesses have been called to give such negative evidence as they might in relation to all the places at which Moore says he used that wrench. He is not corroborated, excepting as to the use in Windsor. The patent was issued upon his written statement that he had not made such use as he now swears to, and was sold under an implied obligation to disclose any such defect in his title. If what he now testifies is true, he has committed a fraud on the public, and on his assignees; and I do not think I ought to regard his testimony of much

weight, except as it is confirmed by others. I think, upon the evidence, I ought to lay out of the case the alleged use in Philadelphia and Hartford.

Moore returned to Windsor in the autumn of 1861, and four witnesses are called to prove that he used, and lent to others for use, a wrench like that of the patent, before October 1, 1862. It is very difficult for witnesses to fix within a month or even a year the exact time of an occurrence of no importance to themselves, to which their attention is called after the lapse of 16 or 17 years. This difficulty, inherent in the subject, must be fully overcome by one who assails a patent. Another question which always arises is whether the use was within the limits of a justifiable test or experiment. I have read the evidence with great care, and am satisfied that Moore did not make a wrench for sale until within two years before his application. As the value of his invention was not for his personal use, as is often the fact with manufacturers who improve a machine used in their particular business, so much as for the sale of the tools or the royalties, I consider this fact very important. The chief witness to prior use, E. F. Spaulding, gives a deposition which is clear and candid; but he had told one of the plaintiffs, a very short time before he testified, that he had no means of fixing the date, and could not fix it. This he very fairly admits, and he does not explain how his memory has been refreshed. Besides, the evidence of this witness, while it is not wholly consistent with itself upon the other point, yet leaves upon the mind an impression that the use which he testifies to was experimental. Such is the fair result of his evidence at pages 235 to 237 of the record. And so of the only other witness whose means of knowledge were considerable, Edminster. The point which the defendant takes as to the use by Edminster is that Moore permitted him to try the wrench in order to induce him or his father to take an interest in it, and help Moore in procuring a patent. The witness so puts it. But I consider it too nice a point to say that the future patentee, when he permits a person to test his tool by a short use with a view to interest him in its being patented, is not testing his tool, but only the

mind of the borrower. I do not know that an inventor is bound to satisfy his own mind alone by his experiments. The question to be determined is not only whether the tool will work, but in what modes and with what advantages over old tools; how well it will work and how cheaply; and I am of opinion that he may, in such a case as this, test not only its patentability, but the degree of it, if I may so say; that is, whether it is worth while to patent it. I must not be understood as speaking of a case in which the tool or thing patented has been sold more than two years before the application.

Decree for the complainants.

DUNBAR and others v. ALBERT FIELD TACK Co. and others.

(Circuit Court, D. Massachusetts. ———, 1879.)

1. PATENTS Nos. 90,902 AND 164,839, for improved cut shoe nails, *held* valid, and infringed by the "cub" nail.
2. INVENTION—PATENTABILITY.—The addition of corrugations to a specific kind of shoe nails is patentable, although shoe nails had been previously corrugated.

In Equity.

LOWELL, C. J. This suit is brought upon two patents granted to Hosea F. Whidden, one of the plaintiffs. No. 90,902, dated June 1, 1869, is for a cut shoe nail having a round frustro-conical head, a tapering shank, and serrated corners or edges; the point of the shank being cut thin so as to clinch readily when the nail is driven against what is called the armored last. Patent No. 164,889, dated June 22, 1875, is for an improvement upon this nail by making the head longer, the mode of making it being fully described.

It has been held by Judge Shepley that this nail does not infringe the patent granted to Estabrook, No. 85,374, dated December 29, 1868, that not being a cut nail, and not having a head. *Estabrook v. Dunbar*, 10 O. G. 909. It is said

that Estabrook and his partner are the persons who make the nails used by the defendants; and the defendants admit that one of the nails which they use infringes both patents; but they deny that the other, or "cub" nail, infringes; and deny that either patent is valid.

There is no conflict of evidence in respect to the principal patent, 90,902. It is admitted by the defendants that the nail is specifically new, and by the plaintiffs that the "Bent" nail, which was patented more than a year before June, 1869, is substantially like Whidden's nail, except that the latter has corrugations on the sides, which undoubtedly serve a useful purpose in holding the nail in place. The question is whether the addition of corrugations to the "Bent" nail is a patentable improvement, in view of the fact, admitted in the specification, that shoe nails had been corrugated before June, 1869.

This question of patentability is often one of very great embarrassment. The patent law requires the presence of what it calls invention, as contradistinguished from constructive ability; but it furnishes no test, for all cases, by which they can be discriminated. The decision does not necessarily depend upon the amount of thought, or even of experiment, which may have been had in reaching the result. Thus, if an old machine or process is put to a new use, invention is positively excluded, although the new use may apparently be very remote from the old, requiring experiment to ascertain its practicability; and though the actual operation of the machine or process may not be exactly the same in the new as in the old application, provided no new means are, in fact, employed.

When the patentee has produced something new, the question is more difficult. Some changes, such as a substitution of brass for iron, or of steam-power for horse-power, are, at the present day, presumed to be within the common knowledge of mechanics.

Does the addition of corrugation to a smooth shoe nail come within this class of cases? It is impossible to give a wholly satisfactory reason for answering this question either

way. That Mr. Bent did not corrugate his nail, and that the patented nail has gone into extensive use, are facts which seem to point to both novelty and utility; and the patent is *prima facie* evidence of both. Judge Shepley held the Estabrook patent to be valid, though of limited application, notwithstanding earlier nails, which, separately considered, contained his improvements. The value of the serrations or corrugations appears to be very marked in this nail, when intended for a shoe nail; and, upon the whole, I do not find it to be proved that this mode of construction was so well known, as applied to cut nails, that I can hold it to have been an obvious alternative mode of making the "Bent" nail.

With regard to patent No. 164,889, the only question affecting its validity is whether the discovery was made by Whidden, or was communicated to him by the plaintiff Dunbar. On this point I have examined the evidence, and do not think that the defence is made out.

Whether the "cub" nail infringes, depends on whether it works in substantially the same way to produce a like result. Neither the head nor the body of this nail is precisely like that of 90,902. It does not begin to taper so soon, and its head and point are both shaped somewhat differently from those described in the patents. I think, however, that the evidence shows it to be similar in operation and result.

Decree for the complainants.

DUNBAR and others v. ESTABROOK and others.

(Circuit Court, D. Massachusetts. ———, 1880.)

1. PATENTS NOS. 90,902 AND 164,889, for improved cut shoe nails, *held* valid, and infringed by the "cub" nail.

Estabrook v. Dunbar, 106 G. 909, explained.

In Equity.

LOWELL, C. J. In this motion for a preliminary injunction the recent case of *Dunbar v. The Albert Field Tack Company*, 4, no. 6—35

pany, ante, 543, has been reargued, as has also that case itself by written briefs, and this opinion will serve for both cases.

In that case I decided that Whidden's patents for improved cut shoe nails, No. 90,902 and No. 164,889, were valid, and were infringed by the nail now before me, called the "cub" nail. The defendants act under the Estabrook patent for an improved screw-peg for shoes, which was decided by Judge Shepley to be valid upon the construction which he gave it, construing the invention somewhat narrowly in order to preserve the patent, but holding that it did not cover the plaintiff's patented cut shoe nails. Estabrook has not confined his manufacture wholly to the nails which he patented, but has made, besides those, one which was an admitted infringement of Whidden, and one other which I decided to be so. This he did, hoping that Whidden's patents would be declared void.

Both questions have been reargued: whether the Whidden patents are valid, and whether the "cub" nail infringes them.

A considerable part of the argument and of the affidavits relies on a supposed opinion of Judge Shepley in the case already mentioned, in which the parties were reversed, (*Estabrook v. Dunbar*, 10 O. G. 909, 910;) the defendants fearing that I may have overlooked Judge Shepley's expressions on this subject, and more particularly what he said about the Field nail. He there said that the nail of Whidden (now the plaintiffs' nail) was "scarcely distinguishable, except in form, from the Field nail, so called, and other tapering and corrugated nails which were in common use. So far as the defendants' (now plaintiffs') nail differs in form from nails which were old, it is merely an attempt to improve upon the form of the old corrugated tapering cut shoe nail."

These remarks are said to have guided the defendants in assuming that Whidden had merely "attempted" an improvement on the Field nail, and in acting accordingly.

No one has a higher estimate than I have of the value of Judge Shepley's opinion. Upon such a question of fact, involving mechanics, I consider it much better than my own. But the remark is obvious that in that case he had no occa-

sion to institute a comparison between Whidden's nail and those which preceded it. I do not believe he intended to express anything more than a present impression, if so much. He was deciding the differences between Estabrook and Whidden, and not those between Whidden and Field or Bent. Judge Shepley, I am sure, would have been much surprised to learn that he was supposed, in deciding one case, to have decided a wholly different one. He said, in passing, that the plaintiffs' nail was much like the Field and other nails, as it was; and most particularly it was very much indeed like the Bent nail,—much more than it was like the Field nail. I compared it with the Bent nail for that reason. It is my habit to deal specially with the part of the case which seems to me the most difficult. When I found that the Bent nail was not, on the whole, an anticipation of Whidden, it followed, in my opinion of the relative importance of those two nails to the issue, that the Field nail was no answer to Whidden's patents. Such was and is my opinion. I do not consider that the Field nail, made in brass, would be a successful shoe nail. It differs at both ends from the Whidden, in important particulars. No doubt the differences in all these nails are somewhat minute, and there is difficulty in sustaining any of the patents; but, for the reasons given in the former case, judging the nails by their work, there appears to me to be novelty enough to save the Whidden patents. It was not the Field nail that caused my hesitation.

I likewise continue to think that the cub nail infringes the patents of the plaintiffs. The defendants maintain that the cub is an improvement upon Estabrook, and in a different line of invention, according to Judge Shepley's views, from Whidden's. I do not understand those views exactly as the defendants do. Judge Shepley saved the Estabrook patent, as I understand his decision, by distinguishing his nail from the earlier imported sprig in three particulars, of which two are that Estabrook's patented nail is without a head, and that it has a regular screw thread. He also twice speaks of the Estabrook nail as made of wire. In these three respects Whidden differed from Estabrook, and therefore did not in-

fringe his patent. In the same respects the cub resembles Whidden, and therefore does infringe his patents. The cub nail may be an improvement on both Estabrook and Whidden, for it has the round body of the former, as well as the above-mentioned features of the latter; but its point of departure does not seem to me to be a headless wire screw peg, so much as a cut corrugated nail with a head.

Injunction granted.

SCHMIDT *v.* THE STEAM-SHIP PENNSYLVANIA.*

(Circuit Court, E. D. Pennsylvania. October 28, 1880.)

1. LIBEL IN REM FOR REFUSAL OF MASTER TO DELIVER GOODS SHIPPED—STOPPAGE IN TRANSITU—RIGHTS OF INDORSEE OF BILL OF LADING. Where the master of a vessel refuses to deliver goods shipped under a bill deliverable to the order of the shipper, in consequence of directions received from the shipper to stop the goods, which stoppage is subsequently withdrawn by the shipper, the vessel is liable *in rem* to the holder for the value of the bill of lading indorsed by the shipper, for the damages sustained by a fall in value of the goods between the time of demand and the time of actual delivery.
2. SAME—MEASURE OF DAMAGES—LOSS OF SALE OF GOODS BY DELAY IN DELIVERY.—If, in consequence of the refusal to deliver, the holder of the bill of lading loses the benefit of a sale which he had made of the goods to arrive, and of which he had notified the master of the vessel at the time of demand, the measure of damages is the difference between the price at which such sale was made and the market price at the time of the actual delivery by the master.
3. SAME—DATE AT WHICH LOSS IS TO BE ESTIMATED—OFFER TO DELIVER—REFUSAL TO ACCEPT.—After libel filed, the notice from the shipper was withdrawn, and the master of the vessel offered to deliver the goods, and requested a discontinuance of the suit. The holder of the bill of lading replied that he would accept the goods at the then market price, if the vessel would pay the loss to that time. Subsequently the goods were delivered without prejudice. *Held*, that the measure of damage was the fall in value to the date of actual delivery, and not to the date of the offer to deliver.

In Admiralty. Appeal from decree of district court.

*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

This was a libel by Henry Schmidt, against the steam-ship *Pennsylvania*, for damages for refusal of the master to deliver 67 bales of goat skins shipped on board of said steam-ship from Liverpool to Philadelphia. The owners of the steam-ship filed an answer averring that the refusal to deliver was in consequence of a notice from the shipper to stop the goods in transit, and that as soon as this notice was withdrawn they had offered to deliver the goods.

The testimony disclosed the following facts: In November, 1877, Henry Schmidt, of Philadelphia, received a letter from Havemann & Polemann, of Paris, France, offering to sell him 10,000 Servian goat skins which they had purchased at Trieste, Austria. On November 27, 1877, Schmidt accepted this offer by cable, and on November 30th sold the skins to arrive to James S. Keene, of Philadelphia. On December 21, 1877, the agents of the American Steam-ship Company received the skins at Trieste from J. Bresch, to be transported to Liverpool, and from thence by one of the steamers of the American line to Philadelphia. They issued a bill of lading for the goods to Bresch in which no consignee was named, but the goods were deliverable to the order of the consignor. Bresch, on the same day, indorsed the bill of lading to Havemann & Polemann, who in turn, upon receiving the money for the skins, forwarded it to Schmidt. The skins arrived at Philadelphia on the steam-ship *Pennsylvania* on February 3, 1878. Before their arrival the agents of the steam-ship company received notice by cable from Bresch to stop the skins on account of insolvency of consignees, and to reship them to Liverpool. Upon the arrival of the steam-ship at Philadelphia, Schmidt presented the bill of lading, informed the master that he had sold the skins to arrive, and demanded delivery, which, in consequence of the notice from Bresch, was refused. On account of the failure to deliver, Keene canceled the contract of sale with Schmidt. On February 12, 1878, this libel was filed by Schmidt against the vessel. On February 19, 1878, the notice to stop the skins was withdrawn, and counsel for respondent then wrote to counsel for libellant offering to deliver the goods,

and requesting libellant to discontinue the suit and send bill of costs. The market price of skins having fallen, Schmidt refused to discontinue the suit unless the steam-ship company would pay to him the difference between the then market price of the skins and the price at which he had sold them to Keene, which difference amounted to \$1,090.51, but offered to accept the goods at such market price if the steam-ship company would pay said difference. This the company refused to do, but afterwards, on March 5, 1878, by agreement in open court, the skins were delivered without prejudice, the court reserving the question of the liability of the vessel for damages.

It appeared from the testimony that owing to the failure in January, 1878, of a large dealer in skins the market at the time of the arrival of the steam-ship was unsettled; some of libellant's witnesses estimating the market value of the skins at that time to be as high as 27 cents per pound, and some of respondent's witnesses placing it as low as 20 cents. It clearly appeared, however, that during February, 1878, the price of skins fell, and that on March 5, 1878, when delivery was actually made, the market value, if there was a market, was but 20 to 22 cents per pound.

The libellant contended that the vessel was liable for the difference between the contract price with Keene and the market value on March 5, 1878. Respondents contended that as the master of the vessel had acted in good faith, in obedience to an order of stoppage *in transitu*, the vessel was not liable at all, and that even if any liability existed it could only be for the decline in market value between the arrival of the vessel and the offer to deliver the goods made February 19, 1878. The district court entered a decree in favor of libellant, *Cadwalader*, D. J., delivering the following opinion: "The detention of the skins by the defendants was wrongful. There could be no rightful stoppage *in transitu* by reason of the former owner's insolvency. Through this wrongful detention, and the consequent inability to deliver the goods to the purchaser in Philadelphia, the benefit of the sale to him was

lost. He rejected the goods, as he had a right to do, and the market had fallen so that a loss, which is the measure of the damage, had been suffered."*

The district judge died before any assessment of damages was made, but as he had indicated during the argument that, in his opinion, the measure of damage should be the difference between the contract price with Keene and the market value on February 19, 1878, the date of the offer to deliver, the parties, by agreement, entered a *pro forma* assessment of damages at \$1,090.51. Both parties then appealed to the circuit court.

E. G. Platt and Samuel Dickson, for libellant.

Morton P. Henry, for respondent.

McKENNAN, C. J. The opinion of the late district judge, who decided this cause, so concisely and accurately states the law by which it must be governed, that I do not propose to add anything to it.

The ordinary measure of damages between vendor and vendee, for breach of a contract for the sale of goods, is the difference between the contract price and the market price at the time and place of delivery, for the reason that this is the actual loss sustained by the vendee. But here the respondent was in possession of the libellant's goods, which were wrongfully withheld from him, whereby he was disabled from performing a contract for the sale of them, and the sale of them was defeated. Of this sale the respondent was duly notified, when a delivery of the goods was demanded, and by its refusal to deliver them took the risk of a renunciation of the purchase by the complainant's vendee. Whatever sum the complainant would have realized by this contract in excess of the market price of the goods at the time of their delivery, when he had the power to dispose of them, is clearly the amount of his actual loss which was caused by the respondent's act. The goods were withheld from the complainant until the fifth of March, 1878, and for the difference between their market price at that time and the price for which they had been sold

*For a report of the case in full, with arguments of counsel, see 7 Weekly Notes, 98.

to Keene, he is entitled to a decree. This difference amounts to \$1,961.57, for which sum, with interest from March 5, 1878, and costs, a decree will be entered in favor of the libellant.

TERRELL v. THE SCHOONER B. F. WOOLSEY.

(Circuit Court, S. D. New York. October 23, 1880.)

1. ADMIRALTY JURISDICTION—POSSESSORY LIEN—"COMMON-LAW REMEDY"
—REV. ST. § 563.—A statutory proceeding of an equitable nature, for the enforcement and foreclosure of a possessory lien, founded upon a maritime contract, is not "a common-law remedy" within the meaning of section 563 of the Revised Statutes, relating to the admiralty jurisdiction of the United States district courts.

In Admiralty. Appeal from the district court.

Henry D. Hotchkiss, for Hawkins.

H. B. Kinghorn, for Daniel H. Terrell.

BLATCHFORD, C. J. This libel was filed in the district court against the schooner B. F. Woolsey, *in rem*, for wages alleged to be due to the libellant as a mariner on board of that vessel. One Daniel H. Terrell filed a claim to the vessel, and one John P. Hawkins also filed a claim to the vessel. Each claimed a right as owner to bond the vessel and defend the suit. Daniel H. Terrell was the owner of the vessel. Hawkins claims to have acquired and displaced the title of Daniel H. Terrell by certain proceedings in a suit in the supreme court of New York. On the petition of Daniel H. Terrell, and after hearing him and Hawkins, and examining the proceedings in said suit, the district court made an order permitting Daniel H. Terrell to intervene and claim the vessel as her owner, and to defend the suit, and adjudging that Hawkins was not her owner, or entitled to appear as claimant or to defend this suit, and striking out his claim. Hawkins appealed to this court.*

*See *The Town of Pelham v. The Schooner B. F. Woolsey*, 3 FED. REP. 457.

The only question involved is as to the title which Hawkins acquired. In October, 1879, Hawkins brought a suit in the supreme court of New York against Daniel H. Terrell and one Whitehead. The complaint in that suit alleged that the plaintiff was a shipwright; that in August, 1879, the defendant, Daniel H. Terrell, owned the vessel and employed the plaintiff to make certain alterations and repairs on her; that for that purpose said Terrell delivered the vessel into the possession of the plaintiff, and the plaintiff performed labor on her, and furnished materials to her of the value of \$869.46, which sum said Terrell promised to pay; that the vessel remains in the possession of the plaintiff, and he has a lien on her for the value of said alterations and repairs; that he has incurred expenses for wharfage and a watchman; and that the defendants have, or claim to have, some interest in the vessel; but, if any, it accrued subsequently to the plaintiff's lien. The prayer of the complaint was for a judgment "that the defendants be foreclosed of all right, title, interest, or equity of redemption in said schooner, and that said schooner may be decreed to be sold according to law; that out of the proceeds of such sale there be paid to the plaintiff the amount of his said claim, and costs, and the expense of keeping the vessel," and "that the defendant, Daniel H. Terrell, may be adjudged to pay any deficiency that may remain after the payment of said claim," and costs and expenses.

Daniel H. Terrell put in an answer raising issues for trial. Whitehead answered, raising issues, and setting up a mortgage on the vessel given to him before the plaintiff's claim accrued, and alleging that the state court had no jurisdiction of the cause of action. The suit was tried in the state court as an equity suit, before the court without a jury, and a judgment was rendered that the defendant Terrell owed the plaintiff \$861.31, "for which sum the plaintiff has a lien on the schooner B. F. Woolsey, and that the plaintiff is entitled to a judgment of foreclosure and sale of the schooner B. F. Woolsey;" and that the plaintiff "recover from said defendant Terrell any deficiency which may remain after such sale;" and that the vessel be sold at public auction under the direction of a referee.

whom the judgment appointed; that the referee give a specified notice of the sale by advertisement, etc., that any of the parties to the suit might purchase; that the referee execute to the purchaser a bill of sale of the vessel; that out of the proceeds, after deducting his fees, and the expenses of the sale, and the cost of keeping the vessel after the judgment and before the sale, he pay to the plaintiff a specified sum for his costs and charges in the suit, and also the sum so found due to him; that he deposit the surplus, if any, in court, and make a report of the sale, and specify any deficiency in the sufficiency of the proceeds to pay said amounts; that the defendant, Daniel H. Terrell, pay such deficiency to the plaintiff; that the plaintiff have execution therefor; that the purchaser at such sale be let into possession on production of the referee's bill of sale; "and that the defendants, and all persons claiming under them, or any or either of them, be forever barred and foreclosed of all right, title, or interest, and equity of redemption in the said schooner sold as aforesaid."

Subsequently the judgment was amended by striking out the word "referee" in all places, and inserting the word "receiver," and requiring from the receiver a bond in \$1,000. The receiver sold the vessel at auction under this judgment, and Hawkins became the purchaser of her at such sale. The bill of sale of her to him by the receiver is not in the case. The advertisement of sale gave notice that the receiver would sell "all the right, title, and interest which Daniel H. Terrell and Almeron Whitehead had to or in the schooner B. F. Woolsey on the third day of November, 1879." The proceedings in the suit in the state court are sought to be upheld under the provisions of the act of the legislature of the state of New York, passed May 8, 1869, (Laws of New York of 1869, c. 738, p. 1785,) entitled "An act to provide for enforcing the liens of inn-keepers, boarding-house keepers, mechanics, workmen, or bailees upon chattel property." The statute provides as follows:

"Section 1. Any inn-keeper, boarding-house keeper, mechanic, workman, or bailee who shall have a lien upon any chattel property, may commence an action in any court hav-

ing jurisdiction of the amount of such lien for an enforcement and foreclosure thereof.

"Section 2. Such action shall proceed in all respects as civil actions in the court in which the same is commenced.

"Section 3. The judgment in such action may be the same as in other civil actions in the same court, and, in addition thereto, if in favor of the plaintiff, may fix the amount of such lien and adjudge the foreclosure of the same and the sale of the chattel property affected thereby, and specify the officer who shall make such sale, and in such case shall direct the disposition of the proceeds thereof to the payment of the amount of such lien, with the costs of the action, and the costs and expenses of such sale, and shall provide for the safe-keeping of any surplus arising thereon, and the payment thereof to the owner of such chattel property, or his assigns or representatives.

"Section 4. There shall be the same right of appeal from the judgment in such actions as in other civil actions in the court in which the same shall be commenced.

"Section 5. Nothing in this act contained shall be held or construed to affect or impair the right of any person to enforce or foreclose a lien upon chattel property in any other manner than as is herein provided."

It is enacted, by section 563 of the Revised Statutes of the United States, that the district courts of the United States shall have jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it, and that "such jurisdiction shall be exclusive except in the particular cases where jurisdiction of such causes * * * is given to the circuit courts." No jurisdiction of any of such causes is anywhere given by statute to the circuit courts, except where the parties are citizens of different states. With this exception the jurisdiction of all civil causes of admiralty and maritime jurisdiction is in the district courts of the United States, exclusive of the state courts, unless the suit in the state court falls under the head of

"a common-law remedy, where the common law is competent to give it."

It is very clear that the contract for the alteration and repairing of the vessel, set up in the complaint in the suit in the state court as the foundation of that suit, was a maritime contract, and that any suit thereon must be a civil cause of maritime jurisdiction. *In re the Josephine*, 39 N. Y. 19.

In *Brookman v. Hamill*, 43 N. Y. 554, it is said of the United States statute: "This act absolutely divests the state tribunals of jurisdiction to enforce maritime claims or contracts, subject only to the proviso which saves to suitors the right in such cases to pursue in the state courts such common-law remedies as the common law is competent to give. It is impossible to escape the conclusion that any state law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts over that class of cases."

Is the remedy given by the statute of New York such a common-law remedy, competent to be given by the common law, as the act of congress refers to? The state statute is one to enforce a lien on the property. It does not, in terms, provide for a suit against any individual, but merely for an action for the enforcement and foreclosure of the lien. But probably it intends a suit *in personam* against an individual defendant, and a money judgment against him. It then provides for an additional judgment fixing the amount of the lien and adjudging the foreclosure of the same, "and the sale of the chattel property affected thereby." It enacts that the judgment may specify the officer who shall make the sale. The proceeds of the sale are to be applied to pay the lien. It is necessarily implied that the title to the chattel is to pass by the sale, and that the court shall give, by the officer, some evidence of the passing of such title, such as a bill of sale or certificate of sale. The proceeding is essentially one to enforce and foreclose the lien of the chattel. The chattel is, indeed, not seized by process in the suit in the first in-

stance and held in custody till sale. But the suit is essentially one to sell the *res*. The court must also be held to have authority to deliver the *res* to the purchaser. Otherwise there would be a failing fully to enforce the lien for the benefit of the plaintiff.

The judgment in the suit in the state court in this case follows the state statute. It finds a sum due from the defendant to the plaintiff. It fixes the amount of the lien. It adjudges that the plaintiff is entitled to a judgment of foreclosure and sale of the vessel. It orders that the vessel be sold. It specifies the officer who is to sell it. It directs that he give a bill of sale to the purchaser. It prescribes how the proceeds of sale shall be applied. It awards a judgment against the defendant for any deficiency. It orders that the purchaser be let into possession on production of the bill of sale. It bars and forecloses forever all right, title, interest, and equity of redemption of the defendant in the vessel "sold as aforesaid." This is not a common-law remedy. The suit is not one in which the chattel is attached as the property of the defendant in the suit. The decree or judgment is like that in a suit for the foreclosure of a mortgage on land. The suit is essentially a suit in equity. It was so treated in the state court. It was tried by the court without a jury, the defendant having at the commencement of the trial asked for a jury trial and been refused it. The proceeding authorized by the state statute, and the proceeding actually had, was neither a common-law remedy, nor was it a remedy which the common law was ever held to be competent to give.

The constitution of the United States (article 3, § 1) speaks of "cases in law and equity" and "cases of admiralty and maritime jurisdiction," and the seventh amendment speaks of "suits at common law." The distinction between a common-law remedy and an equitable remedy and other remedies is thus recognized, and the same distinction obtains in the United States statute under consideration. An equitable remedy, such as the one in the present case, is not a common-law remedy, or one which the common law was ever

considered as competent to give. To authorize the institution of a suit *in personam* on a contract, with a judgment for money, and to add to it what the state statute in this case has added, is not to add a common-law remedy as respects the proceeding to enforce the lien on the chattel. It is not like a judgment for money, and an execution thereon, under which the interest of the defendant in the vessel might be seized and sold. It is a proceeding based on a prior lien on the vessel to enforce that lien by a sale of the vessel. The lien set up in the complaint in the suit in the state court is a lien claimed to have arisen from the employment of the plaintiff by the owner of the vessel to repair her, the delivery of the vessel by her owner to the plaintiff for the purpose of repairing her, the making of the repairs, and the continued possession of the vessel by the plaintiff thereafter up to the bringing of the suit. No lien by any state statute is alleged, nor any maritime lien, nor is anything alleged as to whether the home port of the vessel was in the state of New York, where the repairs were made.

The findings of fact by the court show that the lien foreclosed was held to be solely the lien so set up in the complaint. The case, therefore, is one of a maritime contract, followed by what is claimed to be a possessory lien, not a maritime lien, nor a lien created by statute. The act of 1869 does not create any lien. It refers to existing liens, and it may be doubted whether it is not limited to liens which in their nature are capable of being enforced and foreclosed by a sale of the chattel by the person holding the lien, and whether it gives to any lien any attribute which it does not otherwise possess. At common law, a lien arising out of a *locatio operis faciendi*, or a hire of labor and services, such as the one in the present case, is merely a right to retain the thing bailed until the compensation for the labor and service is paid. But the lien is one strictly personal to the person contracting to do the work or services, and the thing bailed cannot be sold or parted with by him. Story on Bailments, § 440; Cross on Lien, 47-73; Jones on Bailments, 90.

In *Peters v. Fleming*, 6 Meeson & Welsby, 42, one Wil-

liams delivered to the plaintiff, who was a carver and gilder, certain pictures and picture-frames, the property of Williams, to perform certain work and labor on them, and furnish certain materials for them. The plaintiff performed the work and supplied the materials, and Williams owed him therefor. The articles remained in the possession of the plaintiff under such lien, and they were taken by the sheriff on an execution sued out by the defendants against the plaintiff. The court said: "If we consider the nature of a lien, and the right which it confers, it will be evident that it cannot form the subject-matter of a sale. A lien is a personal right, which cannot be parted with, and continues only so long as the possessor holds the goods. It is clear, therefore, that the sheriff cannot sell an interest of this description, which is a mere personal interest in the goods. * * * Here the interest cannot be transferred to any other individual; it continues only so long as the holder keeps possession of the subject-matter of the lien, either by himself or his servant. Then, as the sheriff cannot sell, neither by the general rule of law can he seize; and there must, therefore, be judgment for the plaintiff."

In *Somes v. British Empire Shipping Co.* 8 House of Lords Cases, 338, it was held that a shipwright, who had a possessory lien on a vessel for repairs, could not, if he kept the vessel to enforce payment, add to the amount for which the lien existed a charge for keeping the vessel till the payment of the debt.

In *Mulliner v. Florence*, L. R. 3 Q. B. Div. 485, the lien was that of an innkeeper. The court said: "The very action of a lien is that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel, so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid."

The foregoing views apply to a common-law lien, such as the one in the present case. As there could be at common

law no sale of the chattel, there could be no common-law remedy for such sale. The common law was not competent to give a remedy to effect a sale, where no right to make a sale existed.

The contract of pawn or pledge gave a different right at common law. There there resulted, by the common law, from the contract of pledge, a right in the pledgee to sell the pledge under certain reasonable conditions on default of the pledgor to comply with his engagement. Story on Bailments, § 310; Cross on Lien, 73; Jones on Bailments, 83, note. All the cases of sales are sales under a pledge or pawn. No case is found of a sale under a lien, such as that in this case.

But even if the state legislature had enacted, or should enact, that a lien thereafter created, of the character of the lien in this case, should carry with it the right to sell the chattel in the manner in which this vessel was sold, and should declare that the remedy given for such right should be regarded as a common-law remedy, the question of the jurisdiction of the state court to entertain such a proceeding for the sale as was had in this case would not be varied in favor of such jurisdiction. The expressions "common-law remedy" and "common law," as used in the Revised Statutes of the United States, are to be understood in the sense in which those words were understood in 1789, when the statute in question was first enacted, it being part of section 9 of the act of September 24, 1789, (1 U. S. St. at Large, 76.) Referring to that section, it is said by the supreme court, in *The Hine v. Trevor*, 4 Wallace, 571: "It could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might be afterwards enacted by state statutes, for this would have enabled the state to make the jurisdiction of their courts concurrent in all cases by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated."

It results that the decree of the district court was cor-

rect, and that a decree must be entered in this court in affirmance thereof, and to the same effect, with the costs of this court to the appellees against the appellant.

MARSHALL and others v. BIGLER and others.

(District Court, S. D. New York. October 28, 1880.)

1. CHARTER-PARTY—NEW AGREEMENT—CARGO—FREIGHT.

In Admiralty.

Butler, Stillman & Hubbard, for libellants.

Enoch L. Fancher, for defendants.

CHOATE, D. J. This is a libel *in personam* to recover the balance of freight alleged to be due under a charter-party. The charter-party was for the carriage of a full cargo of hewn white-oak timber and plank from Newburgh, on the Hudson, to Mare's island navy yard, California, at the rate of 45 cents per cubic foot, "freight measure," cash, on proper delivery of the cargo at Mare's island, "on presentation of the receipt here of the delivery." The libel alleges that the cargo consisted of 47,372 feet of timber and 12,742 feet of plank, or a total of 60,114 feet; that the same was duly delivered and the receipt for the same presented as required by the charter-party; that the amount of the freight was \$27,051.30, on which there had been paid \$25,724.74, leaving due a balance of \$1,326.56, for which this suit was brought.

The answer alleges that the cargo consisted of 45,137 3-12 feet of timber, and 12,028 10-12 feet of plank, or a total of 57,166 feet, on which the freight amounted to \$25,724.74, which had been fully paid. The answer also denies that the libellants had presented any receipt for the delivery of the cargo, which is claimed to be made, by the charter-party, a condition of the payment of the freight. The answer further set up as a separate defence the making of a new agreement between the parties subsequent to the charter-party, whereby the sum of \$25,724.74 was agreed upon in full compensation
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for the freight upon this cargo, to be paid in notes, under the terms of which new agreement there was due from the libellants to the defendants the sum of \$461.42 as a rebate of interest.

1. The first question to be determined is the amount of the cargo. The libellants, in proof of their allegation that the cargo consisted of 47,372 feet of timber, and 12,742 feet of plank, have produced the testimony of a United States inspector of lumber, and his assistant, examined under commission in California, in January, 1875, to the effect that they measured the cargo of the vessel on its delivery at Mare's island navy yard, and that they took both the government measurement and the freight measurement; that the freight measurement was 60,114 cubic feet, and the government measurement was 57,290 cubic feet. It further appeared, by the correspondence between the parties in the year 1874, that the libellants had claimed that these amounts were distributed between the timber and plank as follows:

					Feet.
Government measure of timber,	-	-	-	-	44,915
" " " plank,	-	-	-	-	12,375
					<hr/> 57,290 <hr/>
Freight,	"	"	timber,	-	47,372
" " " plank,	-	-	-	-	12,742
					<hr/> 60,114 <hr/>

But the libellants offered no evidence of the respective measurements of the timber and the plank, as found by these witnesses. The California inspector testified that there was a difference between government measurement and freight measurement; that the government measurement includes only sound timber, and excludes all raft plugs and other defects, while freight measurement is the actual cubic measurement, including everything—raft plugs and all other defects. Against the evidence of the California inspector and his assistant the defendant has produced the testimony of the government inspector who measured the lumber for the government at

the time of its shipment at Newburgh. He was examined in court in October, 1880, and was aided in giving his testimony by the book in which he entered the measurement of the lumber. His testimony is to the effect that he measured each stick of timber and ascertained its actual cubic contents; that his measurement was taken from the extreme end of each stick to the other extreme end; that the timber was square-hewn timber; that there were no spurs on the timber or other defects making it necessary to reject any part of its length in the return of the government measurement; that the logs afterwards sawn into plank were first measured in the stick; that afterwards the planks were separately measured; that the total measurement of the logs, including those sawn into planks, was 60,695 11-12 cubic feet; that those sawn into planks measured 15,618 8-12 cubic feet; that these made, in planks, 12,028 8-12 cubic feet; that what went into the vessel was the unsawn timber, 45,137 3-12 cubic feet, and plank 12,028 8-12, making a total of 57,165 11-12 that went into the vessel; that he gave Bigler & Co., the defendants, a certificate for the 60,695 11-12, on which they were to get their pay from the government.

There is testimony on the part of the libellants tending strongly to show that this witness did not measure the logs from one end to the other, but that he rejected in his measurement defective parts at both ends; that there were spurs on the large ends of the sticks and other defects, and that in measuring the logs he only measured the square, sound portions. There is evidence on the other hand corroborative of his statement that his measurement was of the actual and entire cubic contents of the logs. The book produced by the witness contains a tabulated statement of the logs by number from 1 to 1,010, giving the length in feet, the breadth and depth in inches, and the contents of each in cubic feet. Of the 1,010 logs in number so entered in the book 15 are not now filled out, the figures indicating the dimensions and contents have been erased, and nothing is carried into the footings of the columns for their contents. It is the testimony of the inspector that the logs sawn into plank are in this

table marked "P," and 302 of the 995 logs whose contents are given in the table are so marked. The bill of lading calls for 693 pieces of timber, and there are 693 pieces of lumber, besides those marked "P," whose contents are given in this table. This table covers 47 pages, each of which is separately footed up. After the table comes the following entry on a separate page:

RECAPITULATION.

997 pieces, containing	-	-	-	63,507 10-12
Less thin boards and heart plank, etc., left				
on dock,	-	-	-	2,811 11-12
997 pieces,	-	-	-	60,695 11-12

The witness testified that the 2,811 11-12 cubic feet of thin pieces, etc., was ascertained by him from the actual measurement of pieces that came off of the sawn logs, which pieces were not suitable for planks.

An examination of the detailed statement or table contained in the book gives the following result:

The 693 logs not marked "P" contained	-	45,160 7-12
The 302 logs marked "P" contained	-	18,346 6-12
Total,	-	63,507 1-12

This result differs from the total given in the "recapitulation" only by nine-twelfths of a cubic foot—a difference, doubtless, owing to a mistake in the "recapitulation" in adding up the footings of the pages. It is evident from this statement, as well as from the witness' own testimony, that his memory was somewhat at fault in respect to the matter. The total contents of the 302 logs sawn into planks was 18,346 6-12, instead of 15,618 8-12, as stated by him. The amount entered on defendants' books as the amount of the 693 unsawn logs, which amount the defendants also furnished to the libellants afterwards as the amount of freight measurement on which to compute the freight, was 45,137 3-12 instead of 45,160 7-12, which is the true result of the inspector's book. I have not been able to discover how this slight difference occurred. The defendants appear to have taken the figures

from the inspector or his account, and the difference may be accounted for on the supposition of an error in adding up the total of the contents, given in his book, of the 693 logs not marked "P."

It is evident that the amount of the logs sawn into plank, for which the inspector gave the defendants a certificate to use with the government, was diminished by the 2,811 11-12 feet of boards, etc., left on the dock. But deducting this from the total of 302 logs by the book, 18,346 6-12, we have 15,534 7-12. This differs also a little from the witness' statement of the contents of the logs sawn into planks, 15,618 8-12. This difference remains unexplained. His testimony is that 303 logs were so sawn. Those marked "P" are only 302. At the other end of the book is a table apparently showing the contents of the planks, the table giving the contents of 632 planks. Against each there is noted the number of the log, corresponding with the numbers of those entered with the mark "P" in the book, except that four of the logs which are left blank in the book appear in this table of the planks. The total contents of the 632 planks is 146,169 feet board measure. This is equivalent to 12,180 9-12 cubic feet. The four logs included in this table which are not included in the 302 logs marked "P"—Nos. 579, 701, 906, and 907—furnish 7 planks, whose contents in all are 1,452 feet board measure, or 121 cubic feet. Deducting these we should have 625 planks, containing 12,059 9-12 cubic feet. The testimony of the inspector was that the planks measured 12,028 10-12 cubic feet. The bill of lading calls for 626 planks. It contains a memorandum also that five planks are in dispute, to be delivered if on board.

It is thus impossible to reconcile with the book kept by the inspector his testimony as to the quantity either of the timber or of the planks that went on board. The quantities given by him, and now insisted on by the defendants as the true measure, differ from those shown by his book; and the method by which one was derived from the other—by addition, subtraction, or alteration of figures—cannot now, apparently, be discovered. The total quantity of timber and

planks sworn to by him as his measurement—57,166 cubic feet—does not differ materially from the quantity found by the California inspector as the result of his government measurement—57,290 feet. Considering the uncertainties above pointed out, in regard to the Newburgh inspector's testimony, I think the California inspector's return of the government measurement is the more trustworthy, unless his whole testimony is to be rejected, as is insisted by the counsel for the defendants. It is insisted that there is evidence of an intention on the part of the captain of the vessel to procure at Mare's island a greater and false return of the freight measurement. There is nothing in the testimony, of any value as evidence, supporting this theory; and the point made, that because the mate of the vessel testified that he helped the California inspectors by holding the tape-line, therefore discredit is thrown on the results they reached, has, I think, no force.

The principal question, however, is whether these California inspectors are to be credited in their statement that the actual or freight measurement of the timber and planks was 60,114 cubic feet. If this is true the Newburgh inspector who was examined on the trial was mistaken in his recollection that he took the actual measurement of the entire logs. He must have taken less than that to account for the large difference in quantity. It is not improbable that, when examined six years after the event, his recollection should be at fault on this point. His measurement was undoubtedly a measurement for the government alone, and not for the purpose of getting the freight measurement. Upon all the testimony I think it is clearly proved that there was a difference between the government and the freight measurement of this cargo, and that the measurement taken by the inspector here was government and not freight measurement, and that the amount given by the California inspector must be taken to be the only freight measure that was taken. The allegations of the libel as to the quantity of the cargo and amount of freight, according to the charter-party, are satisfactorily proved.

2. The defendants clearly waived the condition of the charter-party requiring a formal receipt of the delivery of the cargo. On the fourth of April, 1874, the libellants, having received advices of the delivery of the cargo and of the quantity delivered, as stated in the libel, wrote to the defendants giving in detail such return, and calling on defendants to settle the balance of the freight. The defendants replied to the letter on the eighteenth of April. This reply and the subsequent correspondence show that the defendants accepted this statement in the libellants' letter of April 4th in lieu of the promised receipt, without any objection to the form in which the amount was communicated. It is now too late to insist on a technical compliance with this provision of the charter-party.

3. The defence set up in the answer, of a new and subsequent agreement discharging the charter-party, grows out of a transaction that took place between Mr. Bigler, one of the defendants, and Mr. Lamson, one of the libellants, who has died since this suit was commenced. After the ship was loaded, and perhaps after she had sailed, Mr. Bigler came to New York and had an interview with Mr. Lamson at his office here. There had been some previous conversation between them regarding the giving of notes for the freight, and Mr. Bigler brought with him an unsigned bill of lading and the paper which is claimed to be the new agreement, drawn at Newburgh, except that the details of the notes were not inserted. It is a receipt for four notes, amounting in all to \$25,774.74, payable in three, four, five, and six months from their dates, August 14, 1873. The receipt states that "said notes are given to and received by us (C. H. Marshall & Co.) for our compensation for charter of ship Alexander Marshall, owned by us and chartered to said J. Bigler & Co., to convey a cargo of timber and plank from Newburgh to Mare's island, and when paid are to be in full for said compensation."

Then follows an agreement to pay J. Bigler & Co. interest at 7 per cent. per annum on all moneys they shall pay on said notes, or either of them, from the dates of such payments to the time of the delivery to the said J. Bigler & Co., in New York city, of a receipted bill of lading, showing due delivery of said

cargo, etc., or until the moneys so paid by them shall be refunded by C. H. Marshall & Co., or the notes delivered up to them. And then follows an agreement as to giving up the notes or refunding the money in case of wreck or other event defeating the delivery. The amount of the notes was computed at the rate named in the charter-party, 45 cents per cubic foot upon 57,166 cubic feet. These figures were furnished to Mr. Lamson by Mr. Bigler as the quantity of lumber shipped, namely: timber 45,137 3-12, and plank 12,028 10-12; and these amounts were minuted in pencil on the unsigned bill of lading produced at the same interview by Mr. Bigler. It is testified by Mr. Bigler that Mr. Lamson demanded that Bigler & Co. should pay freight on a larger amount, which Mr. Bigler stated to him was the quantity on which the government paid him, that amount including the cubic contents of the logs sawn into plank, instead of the 12,028 cubic feet, the quantity of the plank. But I am not able to credit the testimony of Mr. Bigler on this point. It is grossly improbable. The other party to the conversation is dead. The captain, who Mr. Bigler swore was present, denies that he was there. The witness Bigler is not only an interested party, but is to such a degree what may properly be called a swift witness, that his statements are to be received with great caution on any point on which he may be mistaken. Mr. Bigler having furnished the figures, the notes were filled out and signed; the blanks in the receipt were filled, and it was signed. The bill of lading was also signed by Lamson in the name of C. H. Marshall & Co., and delivered, with the receipt, to Mr. Bigler. This bill of lading provides that the freight is to be paid "as per charter-party." At the same time, Mr. Bigler signed an agreement to pay any unpaid notes not yet matured upon presentation of the receipt for the delivery of the cargo.

I think it sufficiently appears from this paper, called an agreement, and from that signed by Mr. Bigler, and the bill of lading signed and delivered at the same time, that this paper or receipt signed by the libellants was not, within the intention of the parties, a new and substituted contract as to the amount of freight, but that the transaction represented

by it was merely a payment in advance, by means of notes, of the freight stipulated for in the charter-party, and that the words "in full compensation," used in the instrument, have no greater effect than such words in a receipt for money due under a contract; that there was no purpose to depart, as to the amount of freight, from the terms of the charter-party, but on the contrary to adhere to those terms and settle on the basis of them; that it was an agreement, not as to the terms of the contract for the use of the ship, but only as to the mode of paying the amount due or to become due under the contract for the use of the ship, which, in all other respects, including the rate of freight, was adopted and continued in force by the express reference thereto in the bill of lading, which is to be regarded as part of the same transaction. The adjustment of interest to conform to the payments to be made to the actual payment required by the charter-party, and to make them exactly equivalent to it, strongly shows the same purpose.

The fact that Mr. Bigler furnished the amount of the cargo as the actual or freight measurement, which is proved by Mr. Bigler's own admission, and the fact that the libellants accepted it upon his statement, clearly show that both parties acted under the assumption that this amount was what the charter-party called for, and that they both intended, so far as the amount of freight was concerned, to adhere to the charter-party, and understood that they were doing so. The defendants insist still that this amount was the actual freight measurement. The fact being proved that it was some 3,000 cubic feet short of that, they cannot now insist that they shall have the benefit of the mistake which the libellants were led into by the defendants' own statement of the fact, erroneously, but perhaps innocently, made. If the receipt given had the character of a substantially new agreement imputed to it by the defendants, so that it could not at law be varied by parol, the case is clearly one in which the libellants are entitled to be relieved from it on the ground of mistake. If, on the one hand, Mr. Bigler's misstatement of the amount was intentional, then the libellants are entitled to be relieved on the

ground of fraud. If it was an innocent mistake, then it is unjust and unconscionable for him to insist on the benefit of it. Moreover, the correspondence between the parties shows clearly that the defendants admitted the libellants' right to a re-adjustment of the amount of the freight if their claim was sustained that the freight measurement in fact exceeded that which was made the basis of the alleged subsequent agreement.

In their letter of April 4, 1874, after stating the return of the freight measurement received from California, the libellants say: "We would call your attention to the latter, (*i. e.*, the freight measurement,) and think we ought to be paid on the difference as per charter-party, namely, 2,948 feet." In reply the defendants, on the eighteenth of April, wrote: "Your favor showing the amount of oak delivered at the Mare island navy is at hand. I have been from home, or it would have sooner had attention. I hope to receive an explanation soon showing the difference of measures, and as soon as we do, will call on you to adjust the account." Mr. Bigler has testified that, in using the words "will call on you to adjust the account," he referred only to the account of interest which, under the alleged subsequent agreement, was required to be made. It is impossible to believe that this is so. The perfectly obvious meaning of the letter is otherwise. That which the letter, to which this is a reply, alone asks to have adjusted, is a difference in the amount of freight.

The reply, without objecting to the justice of the demand, if the alleged fact on which it is based is true, asks time to ascertain if the fact of excess of actual cargo over bill of lading is correctly stated, and promises to call and adjust the account on ascertaining how the alleged fact is. There was no possible occasion for time to inquire as to the actual amount of the cargo, if all that the defendants intended to adjust was the interest under the agreement; and as matter of construction their letter must be held to be a written admission that the existing contract between the parties in respect to the amount of freight was the charter-party and that alone. The rule excluding parol evidence to vary a written agreement

does not preclude the parties to an agreement from varying or construing its terms by a subsequent writing. These letters constitute such a subsequent written admission as to the meaning of the contract. The testimony of the witness Bigler, in reference to this letter which he wrote himself, illustrates the untrustworthy character of his testimony as above referred to. In any view of the transaction the libellants are entitled to recover the balance of their freight according to the charter-party. The defendants are admitted to be entitled to the interest claimed, \$461.42. Deducting this from \$1,326.56, the balance of the freight, there remains due to libellants \$865.14, with interest from April 4, 1874, \$341,—in all, \$1,206.14,—for which sum, with costs, the libellants are to have a decree.

DIEBOLT v. CANAL-BOAT CHESTER HAIR.

(District Court, S. D. New York. ———, 1880.)

1. ESTOPPEL.—POSSESSION—SALE.—An authorized but long-continued possession does not estop the owner of a boat from claiming title against a *bona fide* purchaser under an unauthorized sale.
2. SAME.—INACTION.—Such estoppel cannot be based upon mere inaction, not amounting to an actual or intended abandonment of the boat.

In Admiralty.

W. R. Beebe, for claimant.

J. A. Hyland, for libellant, was stopped by the court.

CHOATE, D. J. I do not wish to hear the other side. I have no doubt whatever about the case. Diebolt was the owner of the boat, and the question is whether he has lost his title. It is claimed that he is estopped. He put the boat in possession of this man Highland under a contract which expressly reserved the title in Diebolt, and he gave Highland no authority to sell her. Dufresne got no better title than Highland got by his purchase from him.

In the first place it is claimed that Diebolt is estopped

because he let Highland have the possession of the boat, and continue in possession for a long time with the entire control of her. It is well settled that an owner of personal property cannot be deprived of his title by reason of his putting it in the possession of another.

Possession, and that apparent ownership which may be inferred from possession, is not such an *indicium* of ownership that a *bona fide* purchaser from the party in possession gets a good title as against the real owner, though the possession has been by consent of the owner. The case of *Ballard v. Burgett*, 40 N. Y. 314, settles this, and it is immaterial whether the possession continues one year or four years. Then it is claimed that Diebolt is estopped by having permitted Dufresne to expend money in repairs.

I have watched the evidence which would warrant the finding of an estoppel against the libellant, for the case of Dufresne is a hard one; and certainly, as to the payment of the purchase money, and the earlier repairs, they seem to have been made in good faith, and in the belief on Dufresne's part that he owned the boat, and that Highland had authority to sell to him; and when he bought her she was of very little value.

As to the later repairs, there is evidence that he had been told that Diebolt was looking after the boat. If Diebolt had known of and permitted repairs or rebuilding, knowing that the party expending the money thought he had a good title by the purchase from Highland, an estoppel might arise. But there is no proof of such a thing. All that is shown, the utmost, is that he was slow, indolent, in hunting up the boat; but he made inquiries with a view to finding her after he heard of Highland's death, and finally sent an agent to find her. Mere inaction, not amounting to an actual or intended abandonment, is not enough to base an estoppel upon.

The libellant must have a decree, with costs.

JOHANSEN v. THE BARK ELOINA, etc.

(District Court, E. D. New York. ———, 1880.)

1. DAMAGE BY COLLISION—DEMURRAGE AND INTEREST.—Where a vessel at anchor in New York bay was damaged by collision with another one drifting, and recovered therefor, *held*, that the evidence warranted the conclusion that the anchor was lost by being slipped to avoid the collision, and the inference was fair that to recover it would cost all it was worth, the claimant making no attempt to repel it; that interest on demurrage is not to be allowed under the practice of this court.

Exception to Report of Commissioner.

Butler, Stillman & Hubbard, for libellant.

Coudert Bros., for claimant.

BENEDICT, D. J. The evidence seems to require the conclusion that 45 fathoms of chain were lost, if any was lost. The evidence as to the value of the chain does not appear to be objected to, and it may be deemed sufficient to warrant the conclusion that the value of 45 fathoms of chain and the anchor was \$694.54. As to the demurrage, the allowance of two days is all that the evidence will support. The charge of \$10 for a translation of the log was properly disallowed. It was not a disbursement necessarily resulting from the collision. The charge for the protest is different, because the law of Norway makes it the duty of the master, in every case of collision, to take the testimony of his crew, and embody it in a protest.

The evidence warrants the conclusion that the slipping of the anchor was caused by the collision, and the circumstances gave no time to buoy it. It having been proved that the anchor and chain were slipped when the vessel lay out in the bay where the water is deep, the fair inference, in the absence of any other evidence, is that it would not be possible to recover it, except by an expenditure equal to its value. If such be not the fact, it was easy for the claimant to show it. The proposition that in all cases where property is sunk, in order to entitle a libellant to recover for its loss, direct evidence that it cannot be raised must be given, is not supported

by the authority cited, (*The America*, 11 Blatchf. 486.) The impossibility of raising sunken property is inferrible from circumstances. Where property is sunk in broad ocean, the fact of locality will warrant the inference that it was impossible to recover it. So in this case it is proper to infer, from the nature of the articles sunk and the locality, that the cost of raising would exceed the value of the property. This inference is fair, because there has been no attempt on the part of the claimant to adduce facts calculated to repel such an inference. Earnest objection is made to the allowance of interest. The commissioner has allowed interest upon the demurrage, in accordance with the decision in the late case of *The Alexandria*, S. D. of N. Y., July, 1879, where the learned judge of the southern district of New York, after examining the subject, held that interest upon demurrage must be allowed, in order to give full indemnity.

Upon the argument here it was claimed, on behalf of the libellant, that the ruling of Judge Choate, in the case of *The Alexandria*, had been affirmed by the chief justice, upon appeal; while on the other hand it was claimed that a different ruling had been made by the chief justice in the case of *The New Orleans*, and it was also claimed that the case of *Mailer v. Express Co.* 61 N. Y. 316, decided by the New York court of appeals, to which Judge Choate refers in his opinion, has since been overruled by the court of appeals in the late case of *White v. Miller*, October 14, 1879. See New York Weekly Digest of January 23, 1880. In this district the practice hitherto has been not to allow interest upon demurrage; and the practice in the southern district of New York is believed to have been the same, up to the time of the decision of the case of *The Alexandria*. In the case of *The Baltic*, in the southern district, 3 Ben. 195, no interest on the demurrage was allowed by the commissioner. The report was before the court upon exceptions, but the question of interest was not passed on. In the case of *The Thomas Kiley*, 3 Ben. 229, no interest upon the demurrage was allowed, but it does not appear that it was claimed. In the case of *The Favorita*, 4 Ben. 133, where demurrage formed a principal

point of the controversy, interest upon the demurrage was not allowed, but it does not appear that it was claimed. In the case of *The Transit*, 4 Ben. 138, no interest on the demurrage was allowed, and, so far as appears, no claim for interest was made. In the case of *The Emelie*, 4 Ben. 235, no interest on the demurrage was allowed, and, so far as appears, none was claimed. In the case of *Keen v. Audenried*, 5 Ben. 53, demurrage was allowed, but, so far as appears, interest was not claimed. This was an action upon a charter-party, where the liability for demurrage arose from the contract, and the rate of demurrage was fixed by the charter. In the case of *393 Tons of Guano*, in this district, 6 Ben. 535, demurrage was allowed without interest. This case, like the last, was upon a contract, and where no claim for interest was made. In the case of *Baetjer v. Boers*, 7 Ben. 293, demurrage was allowed without interest, and no exception was taken. This also was upon a contract. In the case of *The New Orleans*, decided May 25, 1877, this question was distinctly presented to Judge Blatchford, in the district court of the southern district of New York, by an exception to the refusal of the commissioner to allow interest on demurrage in a case of collision, and the ruling of the commissioner was upheld. These cases show that the practice in the district courts of these two district has been not to allow interest on demurrage. The case of *The Alexandria*, above referred to, was before the chief justice holding the circuit court for the southern district; but an examination of the opinion on file shows that no objection was made in that court to the amount of the decree in the district court. It is evident, therefore, that the allowance of interest in that case was not made a subject of review in the circuit court. The case of *The New Orleans*, above referred to, in which Judge Blatchford, upon the exceptions to the report, expressly ruled against the allowance of interest on demurrage, also came before the chief justice in the circuit court upon appeal, and was decided some weeks after his decision of the case of *The Alexandria*. It was there declared that "the judge below was right in his rulings," one of which rulings was that interest

on the demurrage was not allowable. The opinion of the chief justice also contains the following language: "As to interest on the sum allowed for demurrage, I think under the circumstances it was properly rejected. The amount allowed is sufficient, under the circumstances, to cover interest to the date of the report." This language, taken in connection with express affirmance of the ruling that interest upon demurrage was not allowable, at the most imports nothing more than that the allowance of interest upon demurrage is in the discretion of the court, in view of all the circumstances. It thus appears that there is no decision binding upon this court which can be considered an authority for the allowance of interest on demurrage; and with all my respect for the opinion of the judge of the southern district, I am unable to see that it is my duty to change the practice hitherto pursued in this court. I may add that, if interest on demurrage is to be allowed in the discretion of the court, the present is a case for its disallowance, because of the unreasonable delay on the part of the libellant to bring his cause to trial, and the hardship that in this case has resulted therefrom.

The libellant's second exception is allowed, and the others disallowed. The claimant's exception as to allowance of interest is allowed, and the others disallowed.

THE COOS BAY WAGON CO. v. CROCKER.

(Circuit Court, D. Oregon. November 22, 1880.)

1. **VENDOR'S LIEN.**—Upon the sale of real property on credit, without collateral security, the vendor has a lien upon the same for the unpaid purchase money, unless it was waived by the express agreement of the parties; and such lien exists and may be enforced against all persons claiming under the vendee with notice that the purchase money is unpaid.
2. **ASSIGNMENT.**—The assignment and acceptance of a contract for the sale of real property does not make the assignee personally liable for the purchase money due thereon; and, as against him, the vendor's remedy is confined to the enforcement of his lien on the property.
3. **CONTRACT—ENTIRE OR SEVERABLE.**—Whether a contract is entire or severable, depends upon the intention of the parties, to be gathered from the circumstances of the case.
4. **SAME.**—A contract to sell 96,000 acres of wild land, of different grades and values, lying substantially in a body, at an average price of one dollar per acre, to be conveyed and paid for as and when the same is surveyed and patented to the grantee by the United States, is not as many distinct contracts as there may be conveyances and payments in pursuance thereof, but only one entire contract, and therefore the vendor's lien for any portion of the purchase money thereof remaining unpaid extends to and may be enforced against the whole tract.

In Equity.

Rufus Mallory and W. R. Willis, for plaintiff.

William R. Strong, for defendant.

DEADY, D. J. On March 3, 1869, congress passed an act granting "to the state of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, in said state," the alternate sections of the public land, not exceeding six sections in width on each side of said road, (15 St. 340;) and on October 22, 1870, the legislative assembly of Oregon passed an act granting the Coos bay Wagon Road Company "all lands, rights of way," etc., so granted to the state, "for the purpose of aiding said company in constructing the road mentioned in said act of congress, and upon the conditions and limitations therein prescribed." Sess. Laws, 40.

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On January 1, 1875, the plaintiff was duly incorporated under the laws of Oregon, and on May 31st of the same year had constructed said road, and thereby become entitled under said grant to 95,345.12 acres of said public lands, and had received a patent from the United States for 35,553.59 acres thereof, and was entitled to a patent for the remaining 60,791.53 acres as soon as it was conveyed.

On the same date an agreement was made between the plaintiff, sundry persons who were the stockholders of said corporation, and John Miller for the sale and assignment to the latter of all the stock thereof, and the sale and conveyance of the land and road aforesaid, whether patented or unpatented, less 7,939.94 acres theretofore sold to settlers thereon, for the consideration of one dollar per acre, to be paid as and when the same was duly assigned and conveyed as therein provided; and on the same day said stockholders duly transferred the stock of said corporation to T. B. Benchly, in trust for said Miller, as by said agreement was provided, and the plaintiff duly delivered to him the possession of said road, and conveyed to him the lands for which it had then received a patent, less 6,539.94 acres thereof already sold to settlers thereon, and received therefor from said Miller one dollar per acre, or, in the aggregate, \$29,013.63.

Before the patents were received for the remainder of the lands Miller became insolvent, and was largely indebted to the defendant and Leland Stanford, C. P. Huntington, and Mark Hopkins for money received of them and not accounted for.

On account of this indebtedness, Miller, on June 21, 1875, conveyed the lands theretofore conveyed to him by the plaintiff to the defendant and his associates aforesaid, and on August 18th of the same year, jointly with his wife, and in his true name, A. R. Woodroof, again conveyed the same premises to said defendant and associates; and in like manner, and for the same purpose, conveyed to the same parties the said road; and on July 1, 1875, duly assigned said agreement of May 31, 1875, for the sale and purchase of said corporation lands to the defendant.

In the spring of 1876 the plaintiff caused a letter to be written and sent to the defendant, stating the fact that certain occupants of portions of the then unpatented lands bargained and sold to Miller as aforesaid were willing to relinquish their rights as pre-emptors under the laws of the United States, and purchase from the grantee thereof, and asking for instructions in the premises. The defendant replied, under date of April 5, 1876, "for self and associates,"—Stanford, Huntington, and Hopkins aforesaid, who, together, constituted "The Western Development Company,"—stating that "the owners of the land grant of said company do not desire to have any contest with any *bona fide* settler who settled upon the land which was granted to said company before the passage of the act of congress, and was entitled to a pre-emption thereon," and authorized the plaintiff to convey to such settlers the lands occupied by them, upon the payment of \$1.25 per acre,—the one dollar to go to the plaintiff and the one-quarter to the defendant and his associates,—and also authorizing the plaintiff "to make contracts with such settlers upon all unpatented land, and carry them into effect by deed prior to deeds to be made under our contract to purchase, or we will make deeds when deeded to us, not to exceed 1,000 acres; the proof of such settlement to be sent to me before the adjustment is made."

In pursuance of this instruction the plaintiff sold and conveyed 240 acres of the unpatented lands to settlers thereon for \$1.25 per acre, and on October 14, 1876, paid \$60 of the proceeds to the Western Development Company, and retained \$240 thereof for itself. At the date of the conveyances and assignment aforesaid, made by Miller prior to August, 1875, he was held in confinement, by the defendant and his associates aforesaid, upon the charge of embezzlement while in their employ. Afterwards, it was ascertained that Miller's real name was Woodroof, and that he had a wife in Virginia, whereupon the deeds aforesaid to the premises, dated in August, were executed by him, jointly with his wife, in his true name.

On January 19, 1877, the defendant re-assigned said agree-

ment of May 31, 1875, for the sale and purchase of said land grant to said John Miller, and agreed, in writing, to sell and convey to him all of said lands theretofore conveyed by said Miller to him or his associates, upon Miller's paying therefor the sum of \$1.25 per acre, and expenses incurred thereabout, together with interest upon the purchase money, within 90 days, after which the option of Miller was to cease and determine. This assignment and option, although nominally made to Miller, was intended for the benefit of A. T. Green and H. S. Brown as well, and was in fact an arrangement by which they three were authorized to dispose of this land grant at a profit to themselves, if they could, within 90 days—failing in which, the option and assignment were to become null and void.

By November 8, 1876, the remaining portion of the grant was surveyed and patented to the plaintiff, and on May 5, 1877, it executed a deed in due form of law therefor to the defendant, and duly tendered the same to him on July 27, 1877, and demanded payment therefor, which was refused on the ground that he had re-assigned the contract to Miller. The portion of the grant conveyed to Miller, and by him conveyed to the defendant, is of much more value, probably 50 per cent. more, than the remainder of it. During all the time of these transactions the defendant, and his associates aforesaid, were citizens of California and not resident in Oregon, and were never in the possession or control of the premises, otherwise than according to the foregoing statement of facts, and their legal operation and effect.

Under these circumstances the plaintiff commenced this suit in the circuit court for the county of Coos to recover from the defendant the sum of \$60,791.53, alleged to be due on the contract of May 31, 1875, and to establish and enforce a vendor's lien upon the whole premises for said sum and the costs of suit, which was afterwards removed by the defendant into this court.

It is alleged in the amended bill that the defendant, by reason of the premises, undertook and promised to keep and perform all the covenants in the agreement of March 31,

1875, to be performed by Miller; and upon the hearing evidence was given tending to prove that the defendant, at and immediately before the conveyance and assignment to him by Miller, and in consideration thereof, expressly undertook and promised to do so. But, in my judgment, it is not sufficient to establish that fact. But the evidence satisfactorily proves that the defendant, either in person, or by his agents and attorneys, at and before such conveyance and assignment, had full notice of the contract of May 31, 1875, between Miller and the plaintiff, and the respective obligations and liabilities of the parties thereto.

Having concluded that, as a matter of fact, the defendant did not undertake to perform Miller's contract with the plaintiff, it is unnecessary to consider whether such an undertaking is required by the statute of frauds to be in writing, as set up in the defendant's answer. But the plaintiff claims that the defendant is estopped to deny that he did so undertake and promise, on account of his letter of April 5, 1876, to the plaintiff, by which it appears he assumed to be the assignee of Miller as to this land grant, whether patented or unpatented, and particularly the latter. But there are no elements of an estoppel in this transaction. The plaintiff was neither deceived nor injured by what the defendant said or did in this respect; nor was it thereby or otherwise induced to take any action upon or change its relation to the subject-matter, and without these circumstances there can be no estoppel. *Wythe v. Smith*, 4 Saw. 24; *Wythe v. Salem*, Id. 88. But the transaction, of which this letter is the principal item, is very satisfactory proof that the defendant had become the assignee of Miller, and accepted his assignment of the contract with the plaintiff for the sale and purchase of this land grant. His declarations in this connection are utterly inconsistent with any other theory than that he so regarded himself; and certainly his conduct amounts to a direct assertion to that effect. In this letter to the plaintiff the defendant assumes to be entitled to the control of the land—patented and unpatented—and directs the terms of settlement to be made with the occupants upon the unpatented portion—not exceeding 1,000

acres thereof—and requires the proof of the facts “to be sent to me [him] before the adjustment is made.” He also directed that the proceeds of the sale should be first applied to the payment of the plaintiff, as provided in the contract of sale, and that the remainder should be paid to himself and associates, which was done without, so far as appears, any comment or dissent on his part.

It is admitted that on July 1, 1875, Miller assigned the contract of sale and purchase to the defendant, but it is claimed that the assignment was made without the defendant's knowledge or acceptance, and therefore he is not affected by it. But, from these facts, the only reasonable conclusion is that the defendant was well aware of the assignment, and knowingly asserted his rights under it—that he was the assignee of Miller in fact as well as form. Upon this state of facts the plaintiff claims a vendor's lien as against the defendant upon the whole premises for the unpaid purchase money. It is admitted by the defendant that the plaintiff has such a lien, so far as the lands unconveyed to Miller are concerned; but he denies that it extends to the lands conveyed to Miller, and by the latter to himself and associates. This denial is based upon two grounds: *First*, that it was not the intention of the parties to the contract that any such lien should be reserved as against said lands; and, *second*, that the contract of sale was not an entirety, but separable into two distinct parts or contracts, to-wit: A contract to sell the lands conveyed to Miller, and also a contract to sell the unpatented land, the same to be conveyed and paid for when and as fast as the same was surveyed and patented to the plaintiff.

Upon the sale of real property on credit, without collateral security, equity raises a lien thereon in favor of the vendor as a security for the unpaid purchase money; and this lien exists whether the property is conveyed to the purchaser or not. The vendee is considered the trustee of the vendor in respect to the purchase money until it is paid; and this lien continues and holds good against all subsequent purchasers with notice that the purchase money is unpaid. *Mackreth v. Symmons*, 15 Ves. 329; *Bayley v. Greenleaf*, 7 Wheat. 49;

Chillou v. Braiden's Adm'x, 2 Black, 460; *Lewis v. Hawkins*, 23 Wall. 125; *Gilman v. Brown*, 1 Mass. 212; *Pease v. Kelly*, 3 Oregon, 417; *Baum v. Grigsby*, 21 Cal. 175; *Garson v. Green*, 1 John. Ch. 308; *Champion v. Brown*, 6 John. Ch. 402; 1 Wash. 502-4; *Adams' Equity*, 126-9; *Story's Eq. Jur.* § 1217 *et seq.*; 4 Kent, 151-4. As to the intention of the parties concerning this lien, it is to be considered that the lien is a natural equity, and arises and exists independently of their agreement. Neither is it waived or relinquished unless by an express agreement to that effect, or conduct plainly inconsistent with an intention to retain it, as by taking a mortgage on the premises, or a distinct and independent security for the purchase money; and the burden of proof is upon the purchaser to show that the lien has been waived or relinquished. 1 Lead. Cas. Eq. n. *Mackreth v. Symmons*, *supra*, 364; *Gilman v. Brown*, *supra*, 213; 4 Kent. 152.

In this case no security of any kind was taken for the payment of the unpaid purchase money; nor is there anything in the circumstances of the case to even suggest that there was any understanding or agreement between the parties to the sale to waive the vendor's lien. It is not enough to say that the thought of the lien, as a security for the payment of the purchase money, was not in the minds of the parties at the time of sale; for it is in just such cases that equity, as a means of doing justice between the vendor and vendee, or the assignees of the latter, with notice, creates and enforces this lien. And, therefore, whenever the vendee or assignee seeks to hold property free from this lien, he must show that it was intentionally relinquished by the vendor.

As to whether the contract of sale was an entirety or not, the contention of the defendant is that the sale of the unpatented lands was made by a distinct and separate contract from that of the patented ones, and therefore there can be no lien upon the latter for the purchase money due on the sale of the former. If the premise is correct the conclusion follows of course.

In 2 Parsons on Cont. 517, it is said that "any contract may consist of many parts; and these may be considered as

parts of one whole, or as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract. No precise rule can be given by which this question in a given case may be settled. Like most other questions of construction, it depends upon the intention of the parties, and this must be discovered in each case by considering the language employed and the subject-matter of the contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * But the mere fact that the subject of the contract is sold by weight or measure, and the value is ascertained by the price affixed to each pound or yard or bushel of the quantity contracted for, will not be sufficient to render the contract severable."

In *Miner v. Bradley*, 22 Pick, 457, it was held that a sale at auction of a cow and lot of hay, at one bid, for \$17, was an entire contract; the court saying that, "as the cow and the hay were bought together for one gross sum, there are no means of ascertaining how much was intended for the one and how much for the other."

In *Johnson v. Johnson*, 3 Bos. & Pul. 162, the plaintiff purchased two separate parcels of real property, the one for £300 and the other for £700—each being distinctly valued—and took one conveyance of both. The title to one of the parcels proving invalid he brought an action to recover the consideration thereof, and prevailed; the court, *per* Lord Alvanley, saying: "If the question were how far the part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered to say he would retain all of which the title was good and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. *

* * In this case, however, no such question arises; for it

appears to me, although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300 and the other for £700."

In *Clark v. Baker*, 5 Met. 452, a contract to sell a cargo of yellow and white corn—the quantity being unknown—on board the schooner of the seller, at a certain price per bushel for the yellow and another for the white corn, was held to be an entire one for the cargo, and not any number of contracts for each kind of corn or separate bushel. In the course of the opinion the court says: "If the contract is entire, if it is one bargain, then it matters not whether there is one or many articles, and though each may have an appropriate price."

In *Davis v. Maxwell*, 12 Met. 286, it was held that a contract to work "for seven months at \$12 per month" was an entire one, and not seven separate contracts to work seven distinct months for seven distinct \$12. The court said: "It is one bargain; performance on one part and payment on the other; and not part performance and full payment for the part performed."

According to these authorities, as well as the nature of the case, this transaction was a single and entire contract for the sale of this land as a whole. Indeed, it is difficult to conceive of it in any other light. Briefly stated, a land grant consisting of alternate sections within six miles on either side of a road, about 50 miles long, and running from tide-water on Coos bay across the coast range to Roseburg, and containing about 96,000 acres of wild land, varying in value per acre from nothing indefinitely upwards, was sold in a body for one dollar per acre, by a single written agreement. By the terms of this agreement the land was to be conveyed to the vendee as fast as it was surveyed and patented, and the portion already patented as soon as he could examine the patent and was satisfied with the title—the payments to be made as the conveyances were.

There is nothing in the situation or condition of the subject-matter or the parties that in any way indicates that this contract was not single and entire. It was one bargain, and

the land, although valued by the acre and not absolutely contiguous legal subdivisions, was practically one body—the land grant of the Coos Bay Wagon Road Company. Neither is it to be supposed that the plaintiff would sell the patented part of this grant, which the proof shows, and the court almost judicially knows, was worth much more than the remaining portion, separately, for the same price per acre as the other.

Most certainly the price was an average one for the whole grant, and the sale an entirety. And, as was said in *Johnson v. Johnson*, *supra*, in the consideration of a similar question, “the grossest injustice would ensue” if the defendant was suffered to retain the better part free from the vendor’s lien for the price of the poorer part, upon the arbitrary assumption that the sale was made by two separate contracts. Nothing incapable of mathematical demonstration is more certain than that the parties to this transaction never contemplated that this otherwise single and entire contract of sale was resolved into a number of distinct and separate ones, simply because it was therein provided that the conveyance should be made from time to time as fast as the land was surveyed and patented.

The agreement on the part of the stockholders of the road to transfer the stock to Benchley, as trustee for Miller, to be held by him as such trustee until the final payment was made on the land, was duly performed; but this was not intended as a security for the payment of the purchase money, but rather a security or provision for the custody of the stock during the pendency of the transaction and its delivery upon the final completion thereof.

But this stock, and the road which it represents, are not shown to have any appreciable value; and from this, and the very nature of the case, the reasonable inference is that its value at most is merely nominal. The formation of the company and the construction of the road were the means or device by which the land grant was obtained from the state, and thereafter, I apprehend, neither was of any benefit to any one save the public. Evidently, the stock was a mere nominal and formal part of the transaction, and did not, in

any appreciable degree, affect the amount of the consideration therefor.

Nor should it be forgotten that the justice of this case, as well as the law, is with the plaintiff. The defendant obtained his conveyance and assignment from Miller without advancing anything therefor, the consideration being merely a pre-existing debt, and that of no probable value. And although he is not personally liable on Miller's contract, yet, having accepted a conveyance and assignment from him of the subject-matter thereof,—with notice of the fact that a portion of the purchase money was unpaid, whereby he became the legal owner of an undivided one-fourth of one portion of the property, and the equitable owner of the whole of the remainder,—he is justly liable for such purchase money to the extent of such ownership.

By virtue of its lien upon the premises the plaintiff is entitled to call upon the defendant, as the assignee of Miller, to pay the remainder of the purchase money according to the terms of the contract, or submit to have his interest in the premises sold, and the proceeds applied to the satisfaction thereof. *Champion v. Brown, supra*, 402.

A decree will be entered for the plaintiff accordingly.

STEERS and others v. DANIEL and others.

(Circuit Court, W. D. Tennessee. July 25, 1880.)

1. EXECUTION—LEASEHOLD AND MACHINERY—FIXTURES—HOW LEVIED AND SOLD—ABANDONMENT.—Leaseholds and ponderous machinery being incapable of actual possession, any notorious act asserting title under a levy is sufficient. Such fixtures as would, if the leasehold were a freehold estate, pass as part of the realty, cannot be detached and sold separately. *Held*, therefore, that the marshal need not take actual possession either of the leasehold or machinery; that he need not keep a watchman in charge, nor otherwise manifest a continuing control, nor detach the fixtures; and his failure to do so cannot be treated as an abandonment of his levy.

2. SAME--LEASEHOLDS--WHETHER CHATTELS OR REAL ESTATE.--In Tennessee, leaseholds are by statute to be treated, for the purposes of levy and sale under execution, as real estate, and judgments are a lien upon them. But, whether this be so or not, even at common law, and as chattels, they are to be levied on and sold substantially in the same manner as real estate is now levied on and sold, and the purchaser must bring ejectment to obtain possession. *Held*, therefore, that a paper levy, accompanied by such notorious claim of title as the nature of the case admits, is sufficient, and a failure to do more cannot be treated as an abandonment.
3. SAME, SUBJECT--CASE IN JUDGMENT.--Where the marshal, having levied on a leasehold, and machinery constituting a cotton compress, placed a watchman in charge to protect it from fire, but subsequently withdrew him, and returned his writ with his levies indorsed, and reasons for not selling as advertised, and, without objection, the sheriff afterwards, with an attachment from a state court, at the suit of another creditor, took possession, *held*, that there was no abandonment by the marshal, and the execution creditor has a better title than a mortgagee to whom the debtor had in the meantime conveyed the property.
4. EXECUTION--ABANDONMENT OF LEVY--ESTOPPEL.--After a sufficient levy upon property of the defendant, if he procures a suspension of proceedings by securing from the judge of the court a letter of advice to the clerk to recall the execution, and an "order" from the clerk to the marshal to return it, whether the action of these officers be legal or illegal, he will be estopped from claiming an abandonment of the levy, nor can a subsequent mortgagee, with notice of the facts, set up such a claim in favor of his title.
5. RES JUDICATA--MOTION.--A motion for a *venditioni exponas*, resisted by affidavits to show an abandonment of the levy, is not such a trial on the merits as will be *res judicata* of the questions involved, and does not preclude a bill to enjoin further proceedings.

In Equity.

The defendant Daniel, in January, 1878, leased from one Mitchell and from one Lea, for a period of six years, two parcels of land in Memphis, on Washington and High streets, upon which he erected a Morse Improved Tyler cotton compress, with necessary engines, boilers, machinery sheds, and buildings, to be used in compressing cotton bales. This press is of the most ponderous character, weighing many tons, and was fixed to the soil in the most substantial manner possible, with foundations let deeply into it, as it must be to be used at all. The necessary engines and other machinery were also

built and fixed with brick and mortar. The buildings, except one frame house with rooms, were mere sheds to protect the compress and machinery, the lots being enclosed with a fence. He used the whole in his business of compressing cotton bales. This press and machinery he purchased of the plaintiffs, largely on a credit, under a written contract found in the record, and under which the plaintiffs constructed the establishment. The leases contained the usual covenants for renewal, for forfeiture for non-payment of rent, taxes, etc., and also one that at the end of the term, all rent and taxes being paid, Daniel might remove the improvements.

On the sixth of June, 1878, one Dawson, a defendant in this suit, recovered on the law side of this court two judgments against Daniel, aggregating \$5,629, upon which writs of *fiery facias* issued July 5, 1878, and they were by the marshal, on the ninth of July, 1878, levied "upon the leasehold interest of R. C. Daniel in and to lots 516, etc., (describing them by metes and bounds, and length of term, date of leases, etc.,) and also the interest of R. C. Daniel in and to the Morse Improved Tyler cotton compress, with all its appurtenances and belongings, located in and upon said lots." The indorsement of the levy was accompanied by a more minute description of the leases and ground which was attached to the writ. The marshal advertised the property for sale in a newspaper, gave notice of the levy and sale to one Sarah E. Berry, an occupant of the rooms in the building, and posted notices upon the premises and at the court-house, as fully described in his return to the writs. At the time he made the levy, the marshal, accompanied by the attorney of the execution plaintiff, went upon the premises, found the gates shut, the machinery idle, and the rooms formerly used as an office occupied by a woman and her children. They entered, and the marshal declared his levy, notified the woman of it, and because the place seemed in danger of fire, by reason of the combustible character of the sheds and material about the press, the attorney agreed to pay the expenses of a watchman, and one was placed in charge.

It is stated, by both the marshal and attorney, that the

watchman was placed in charge solely for this purpose, and not for any purpose of taking possession or strengthening the levy. Matters remained in this condition until, sometime prior to August 5, 1878, Daniel's attorney addressed a letter to the circuit judge of this court, at Knoxville, enclosing certified copies of the record in the case of *Dawson v. Daniel*, and making some application for relief against the action of the plaintiff in suing out the execution, the character of which does not clearly appear, except that in his reply to the attorney, which is in evidence in this case, the circuit judge says it is of questionable shape, being neither a bill in chancery nor an application for specific relief. He, however, encloses them a letter to the clerk of the court, and tells them if it cannot be made available they must proceed by a bill of injunction. To explain the bearing of these letters upon the questions arising in this case, it is necessary to state that the judgments against Daniel were rendered at the May term, 1878, by default, and he entered a motion to set aside the default, and for a new trial.

This motion was continued "without prejudice to the plaintiff," until the next term, and the court adjourned. Notwithstanding the pendency of this motion for a new trial, executions were issued and levied as before stated, and the complaint was made to the circuit judge that the clerk had improperly issued them prematurely. The circuit judge, in his letters, expresses the belief that they were prematurely issued, and ought to be recalled, "if that idea be correct, until the merits of the case can be inquired into and adjudicated." In his letter to the clerk he says that the executions ought to be called in as improvidently issued. The clerk treated this as an order, and, under the seal of the court, on the seventh of August, 1878, addressed "an order" to the marshal, accompanied with a copy of the letter of the judge, "notifying" him that the executions were issued without authority, and "requesting him to return the same unexecuted." Upon the receipt of this "order" the marshal returned his writs on the seventh of August, with this indorsement added to that of his levy: "In obedience to an order

issued by Hon. John Baxter, I return this writ without further proceedings hereunder."

On the same day, August 7, 1878, the plaintiffs in this suit, Steers & Co., filed their attachment bill in the state chancery court, claiming a mechanic's lien for the unpaid purchase money due them, and sued out an attachment, which, coming into the hands of the sheriff, was levied upon the leasehold and other property. Prior to the levying of this attachment, and on the eighth of August, Warinner, the attorney for Steers, had gone to the marshal (according to his testimony) to know of him whether he would, under the circumstances, persist in a sale, intending, he says, to enjoin Dawson if he did so persist. The marshal told him he had not determined, but would let him know. The marshal subsequently said to him: "I have removed my watchman; you can take the property and do what you please with it." He then notified the officer, and the attachment from the state court was levied. The marshal says, substantially, that he did not tell Warinner that he could do what "he pleased with the property," but only that "he had withdrawn his watchman." He further says that he did not intend to abandon his levy, but only to return his writ in accordance with the "order" of Judge Baxter, and proceed no further until instructions from the court could be procured. He says when he received the clerk's "order" he advised with Poston, the attorney for the execution creditor, and asked what he should do. Poston told him the "order" was unauthorized, and warned him not to abandon his levy; told him the leasehold was real estate, and it was not necessary to keep the watchman in charge; advised him to withdraw the watchman, as he would not guaranty the expense of keeping him, and return the writ, with a statement of his reasons for doing so, and await instructions from the court.

After the epidemic of 1878, by decree in the state court, Daniel was put in possession as a *quasi* receiver, and authorized to work the press. On November 22, 1878, he executed to Warinner a trust deed to secure Steers & Co., and on same day a trust deed to the defendant Freeman, to secure his sis-

ters and other creditors. These all convey the leasehold and the press. At the November term of this court, in the case of *Dawson v. Daniel*, the motion for a new trial was overruled, and the plaintiff moved for a *venditioni exponas* to compel the marshal to proceed with his levies. Daniel, the defendant, resisted this motion, filed an affidavit, exhibiting Judge Baxter's letters, and the "order" of the clerk, and stating the facts relied on to show an abandonment of the levies by the marshal, and insisted that the *venditioni exponas* should not issue—*First*, because the *feri facias* had issued prematurely, and was void; *second*, because the levies had been abandoned by the plaintiff and the marshal. The court, on February 8, 1879, granted the motion of the plaintiff, and ordered a *venditioni exponas* to issue.

On February 12, 1879, Steers & Co. removed their bill from the state court to this court, and thereupon moved for an injunction against Dawson, who was a party to the bill, to prevent a sale under the *vend. ex.* and for a receiver. Freeman, the trustee for creditors, then filed a cross-bill, claiming the property as against Dawson upon the ground of abandonment, and that the execution was void because issued prematurely. Daniel's three sisters also filed a cross-bill, claiming that Daniel had used their money, left in trust with him, in purchasing the property, and they set up a resulting trust; and Steers & Co. filed a supplemental bill claiming also under their deed of trust to Warriner.

By agreement of all the parties the marshal was made provisional receiver, and, pending the controversy, a private sale was negotiated for \$30,000, which was approved by the court, and an agreed decree entered requiring \$6,000 to be deposited in court to satisfy Dawson's judgment, if he had a better title than Freeman, and the balance was paid in discharge of Steers & Co.'s claim and that of the three sisters. By this arrangement these latter claims are out of the way, and the only question is whether Dawson or Freeman, the trustee, has the better title to the \$6,000.

Gantt & Patterson and Metcalf & Walker, for plaintiffs.

Humes & Poston and Lowrey Humes, for defendant Dawson.

HAMMOND, D. J. This case is to be decided upon the issues made by Freeman's cross-bill, and stands as if he had enjoined further proceedings upon the *venditioni exponas*. If a sale had taken place under that writ, Dawson, the execution plaintiff, would be entitled to the money, no matter what kind of a title had been conveyed. *Hutchman's Appeal*, 27 Pa. St. 209. On the other hand, Freeman can claim nothing under the Steers writ of attachment, and it is immaterial how the case would stand as between Steers and Dawson, or what would have been the result of a controversy between the marshal and the sheriff on the facts of this case. Happily, that controversy is out of the way.

The facts as to the sheriff's levy are only important as throwing light on the question of abandonment by the marshal. Freeman claims that the levies were abandoned at the time the deed of trust was made to him, if not as to the leasehold, certainly as to the machinery, which he claims was personal property, whether the leasehold was or not, and that as to neither did the marshal keep up that dominion and control which the law requires to perfect Dawson's title. It does not lie in the mouth of Daniel, or any one claiming under him with notice, to predicate upon the conduct of the marshal any claim of abandonment. If it was an illegal and unauthorized act of the judge, the clerk, or the marshal to suspend proceedings, it was a fraud on Dawson for Daniel to procure the suspension, and he can take no advantage of it. If the acts of the judge, the clerk, and the marshal were valid, the "order" did no more than suspend proceedings where it found them. An injunction may have operated to release the levy, but not such a proceeding as that. *Bisbee v. Hall*, 3 Ohio, 449. Freeman's conveyance was made while the proceedings were pending. The marshal's return disclosed the levy, and precisely how and in what manner it was suspended; and, moreover, Daniel was in possession as receiver under this Steers bill, to which Dawson was a party. Freeman could not, therefore, be a purchaser without notice, even if he can be treated as a purchaser for value at all, where the trust is to secure antecedent debts. However the conduct of

the marshal might be construed in the case of a subsequent execution creditor, Daniel cannot claim it to be an abandonment, and Freeman occupies no better attitude in filing the bill.

I adhere, however, to the opinion expressed in the case of *Dawson v. Daniel*, 8 Cent. Law J. 185, that, in a strictly legal contest over this title, the facts show no such abandonment as will defeat the title of Dawson, and that without reference to any equitable consideration above mentioned. The question of abandonment is to be tested, not so much by what the marshal did, as by what he was required to do. If, for example, the placing a watchman in charge was unnecessary, his withdrawal cannot be an abandonment. The marshal was evidently trying to hold on to his levies, and all he did must be interpreted in the light of that intention. Yet, if the legal effect of his conduct was an abandonment, his intention to hold on cannot save the levies.

Let us first consider the question without reference to the disputed point whether a leasehold is real estate, and without regard to the "fixtures." Precisely how a sheriff "seizes" or "takes in execution" a term for years, it is difficult to say from anything that has come under my observation. In Pennsylvania, although a leasehold was personal property, and was sold as such, no deed or condemnation being required, as in the sale of lands, it was levied on and sold in the same manner as real estate, the sale and return of the sheriff operating to pass title. *Williams v. Dowling*, 18 Pa. St. 60; *Sowers v. Vie*, 14 Pa. St. 99; *Dalzell v. Lynch*, 4 W. & S. 255.

I take it the same method is proper in Tennessee. *Thomas v. Blakemore*, 5 Yerg. 113. I understand that to have been only a paper levy, and it was held that neither a deed nor registration was necessary. It is said in Freeman on Executions that, as to personal property, there must be something more than a mere pen-and-ink levy. Section 260. But this cannot apply to leaseholds, for they are incapable of anything else, and it is everywhere held that where the property is incapable of manual delivery, or is ponderous and immovable,

these facts must be held to modify that dominion and control which the officer must keep up. Id. § 262a, 263, 280.

In England an assignment of the term was necessary to complete the sale, because of the statute of frauds, and without it the sale was void. Everywhere it was held that the purchaser must bring his ejectment to obtain possession. It was so under the statute of *elegit*, which commanded the sheriff to deliver all the goods and chattels and one-half the lands to the plaintiff. And it was so under the *levari facias*. Under the *elegit*, the plaintiff could treat the leasehold either as chattels, and take the whole at a price, or as lands, and take one-half by extent. The sheriff could enter, if he found the gates and door open, to hold his inquisition, but for no other purpose. If he delivered the term as chattels, or extended one-half as lands, all the tenant, by *elegit*, could do was to bring ejectment. So, under the *feri facias*, all the sheriff did was to sell and assign the term, and the purchaser was put to his ejectment to obtain possession. There was one exception only to this, and that was, if the execution debtor consented to surrender possession the sheriff might put his purchaser and assignee in possession under the *fi. fa.*; but he could not do this by force. If he happened to find the tenant absent he could not seize the possession against his will, for that would be taking forcible possession, which was not allowed. Perhaps the purchaser, if he could get possession, might, relying on his title, retain it under such circumstances, but this principle would not authorize the sheriff to eject the debtor. Watson, Sheriff, 178, 188, 206, 212, (5 Law Library, 128, *seq.*;) Sewell, Sheriff, 226, (36 Law Library, 175;) 2 Saund. 68, 70, 3 Bac. Ab. tit. "Execution," c. 4, p. 699, (Bouvier's Ed. A. D. 1860;) Id. c. 2 p. 688; 5 Id. tit. "Leases," p. 433; Taylor's Landlord and Tenant, § 435; *The King v. Dean*, 2 Show. 88; *Taylor v. Cole*, 3 T. R. 292; *James v. Brawn*, 5 B. & Ald. 243, (7 E. C. L. 83;) *Hughes v. Jones*, 9 Mees. & Wels. 372; *Playfair v. Musgrove*, 14 Mees. & Wels. 239; *Rogers v. Pitcher*, 6 Taunt. 207; and see *Porter v. Cocke*, Peck R. 34, (Tenn.)

I am of opinion, therefore, that, in making a levy on a

leasehold, even where it is taken as a *chattel interest in real estate*, the sheriff cannot oust the tenant in possession or the execution debtor without his consent, and that he cannot, in the nature of the thing, be required to exercise any dominion or control over it, founded on any idea of a right to the possession. He should, no doubt, proclaim his levy to those in charge, and notify the tenants of it; but, strictly speaking, I do not find that even that is necessary to maintain his levy. That which the marshal did in this case was abundantly sufficient. He had no right to put a watchman on the premises, nor to remain on them himself without the consent of Daniel; and, his presence not being necessary to symbolize his title under the levy, his withdrawal was no abandonment, neither was he required to watch and warn off trespassers, whether they came as officers with writs or otherwise.

In *Very v. Watkins*, 23 How. 469, 474, it was said, even of a box of jewelry, that if the officer had a view of it, and it is in his power, he need not take actual possession, but may declare his levy without actual seizure. If any one disputes his title he may retake the property wherever he finds it. *Parrish v. Danford*, 1 Bond, 345. On the theory, then, that the marshal was required to levy on the leasehold as goods or chattels, his levy was complete and his title good, and he could at any time have made an actual seizure, if it became necessary. It was in his constructive possession, and that was enough. The sheriff, on that theory, was a trespasser. Owing to comity between the courts the marshal would, perhaps, not be able to turn him out without an application to the state court itself, but the sheriff's wrongful possession did not displace the marshal's levy. His levy was notorious and sufficient, and the nature of the property was such that he could not and need not take any kind of actual possession. Neither the withdrawal of the watchman nor the entry of the sheriff can, therefore, be treated as an abandonment by the marshal of his title. The fallacy of the plaintiff's position is in supposing that to make or hold a valid levy the marshal should place a watchman in charge, or do some such significant act to manifest and keep up a manifestation of his

title; or that, having assumed to do this in the beginning of his levy, a subsequent neglect to do it is an abandonment. So far as his acts were excessive, he might cease such excess without incurring any imputation of abandonment. He could not legally have forbidden the entry of the sheriff, because, as we have shown, he had no right to the possession of the leasehold lot, and an action of ejectment was necessary to recover that possession. The coerced return of the writ was no abandonment, and all along the marshal had all the dominion and control that he lawfully could have acquired by his levy in the first instance.

Does the case stand any differently as to the machinery? If it be conceded that the machinery is to be treated as personal property, regardless of its annexation to the land, yet, owing to the fact that it was fixed to the soil, was ponderous, and incapable of manual delivery without a severance from the soil, the marshal did all he could do to make an effectual levy, and to keep it up, as I have already shown by the authorities last cited. See, also, *Gladstone v. Padwick*, L. R. 6 Exch. 203. It is undoubtedly true that the officer may remain on the premises where the goods he takes are situated long enough to remove them, but I think he was not required to tear down this machinery and remove it. Except for that purpose he had no right on the lot at all after he had declared his levy. He might well let it stand as he found it; until the sale, at least.

But I cannot assent to the theory that, with such machinery as this, an officer with an execution can sever it and sell it separate and apart from the leasehold. It might not pass under a levy on the leasehold alone, and as a part of it; but that is not the question. He levied on it by name as machinery, and likewise on the leasehold, and the real question is whether he should have severed and sold; or, rather, that being his duty, whether his failure to do it was an abandonment. I am satisfied his duty was to levy, as he did, on both, and sell both together, in precisely the condition the lessee had placed it; otherwise, this valuable machinery, costing many thousands of dollars, would be unnecessarily

impaired in value by severance, and so would the leasehold. The value of each is enhanced by keeping them together.

It is sometimes loosely said in the books that whatever the tenant can remove must be levied on and sold as personal property. This may be so as to mere utensils of trade, or trade "fixtures," which are portable, and not seriously injured or rendered useless by severance. But not so as to structures like this. No doubt the press is valuable when severed, and can be placed on other land, but the mere cost of taking down and putting up is so great, that its value standing and ready for work is far greater, and it cannot be that a debtor can be compelled to submit to a mode of levy and sale which so deteriorates his property. If so, it could be severed and sold on an execution for any small amount. Take the case of buildings built on leasehold land with a covenant for removal. Can it be said that they must be severed and sold by the sheriff, rather than sold all together? It does not follow because the leasehold, or the structures upon it, are personal property, and are sold as such, that they are to be treated as loose or portable chattels, or that the structures are to be severed to make them so. Both being chattels, it may, in a proper case, be sold as a whole; and, if the leasehold be real estate, in the hands of the lessee, the fixtures on it must be real estate, as between him and his creditors, just as they would be if his estate was freehold. Perhaps the true theory is that the fixtures, when of a character to be real estate, if the owner has a freehold in the land, are also real estate if he has only a leasehold with a right of removal, and that it is the right of entry, severance, and removal which is levied on and sold. But the purchaser, if the leasehold can also be sold, buying that, has the same right to let them remain as they were, until it suits his pleasure or interest to remove them, as the lessee or execution debtor had. And, in this view, it is immaterial whether they be real estate or chattels, and I think the sheriff, in a case like this, whether he sells as real property or chattels, should sell all together.

It is not necessary to extend this opinion by reviewing the cases here cited which have led me to this conclusion. Cases

on the subject of fixtures are so numerous, differential, and conflicting that it is quite impossible to find authoritative precedents for any case. It has been frequently said that each must be governed by its own circumstances. The ruling I make here is only that, in a case like this, the machinery must be treated as a part of the leasehold, whether it be real estate or personal property; and that no other duty was required of the marshal in making and keeping up his levy on the machinery than was required in making and keeping up his levy on the leasehold; and, therefore, the levy on the leasehold not having been abandoned, the levy on the machinery was not abandoned by the acts relied on to show such abandonment. *Ewell*, Fix. 353, 357; *Tyler*, Fix. 159, 164, 192, 240, 416, 626; *Freeman*, Ex. § 114; *Watson*, Shff. 179; *Van Ness v. Packard*, 2 Pet. 137; *Kutter v. Smith*, 2 Wall. 491; *Gue v. Tide-water Co.* 24 How. 257; *Elwes v. Mawe*, 2 Smith, Leading Cases, (7th Ed.) 177, 212, 220, 222; *Pemberton v. King*, 2 Dev. Law, 376; *Conkling v. Foster*, 57 Ill. 104; *Pillow v. Love*, 5 Hayw. 109; *De Graffenreid v. Scruggs*, 4 Humph. 451; *Childress v. Wright*, 2 Cold. 350; *McDavid v. Wood*, 5 Heisk. 95; *Cannon v. Hare*, 1 Tenn. Ch. 22, 25; *Boydell v. McMichael*, 1 Crompt. Mees. & Ros. 177, note a, p. 180; *Hallen v. Runder*, Id. 266, 275; *Stewart v. Lombe*, 1 Brod. & Bing. 506; S. C. 5 E. C. L. 768; *Barnard v. Leigh*, 1 Stark. 27; S. C. 2 E. C. L. 217; *Doty v. Gorham*, 5 Pick. 487; *Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 N. Y. 28.

Moreover, I am of opinion that, in Tennessee, leasehold interests are now real estate so far as concerns judgments and executions, and that this judgment was a lien upon this property. The cases already decided in Tennessee settle this principle, though none of them are cases of execution levies. Section 51 of the Code says that the words "real estate," "real property," and "land" include lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal. T. and S. Code, § 51. We have seen that under the statute of *elegit* leaseholds were held to be included in the words "*medietatem terræ suæ*." *Porter v.*

Cocke, Peck, R. 34; 1 Sug. Vend. 660; 2 Tidd, Pr. 1035, 1004; 5 Bac. Ab. title, "Cases," 433; Watson, Sheriff, 207. In *Evans v. Roberts*, 5 Barn & Cress, 828, (S. C. 11, E. C. L. 701,) it is said that in the English statute of frauds the words "lands, tenements, and hereditaments" were used to denote a fee-simple, and the words "any interest in or concerning them," to denote a chattel interest, or any interest less than fee-simple. These are almost the words of section 51 of the Tennessee Code.

It will be found, in examining the subject, that ever since lands in the colonies were subjected to execution there has been, particularly in the colonial and earlier state legislation, a disposition to assimilate leaseholds, at least for long terms, to real estate. The courts sometimes construed the words "real estate" and "lands" to include them, but generally it was held those words did not. Many of the states have, by statute, made them real estate, and there is nothing novel in so treating them. This section of the Code, in my opinion, was intended especially to make leaseholds subject to the incidents of real estate where the statute does not otherwise particularly direct. The case of *The People v. Westervelt*, 17 Wend. 674; S. C. 20 Wend. 416; and *Putnam v. Westcott*, 19 J. R. 73; and the cases cited in Freeman on Executions, § 119, and other text writers,—show the growth of legislation and judicial decision in this direction of making leaseholds real estate.

In *Barr v. Graves*, 11 Central Law Journal, 471, the supreme court of Tennessee held that a leasehold, with its machinery and fixtures for cleaning cotton, could be seized under attachment without going on the premises or taking possession of the property. It is true, the attachment was to enforce a statutory mechanic's lien, but the procedure would be the same, as I have endeavored to show, at common law, and without any lien. Indeed, our method of selling real estate under execution finds its archetype in the common-law mode of selling a leasehold under the *feri facias*, *elegit*, and *levari facias*. The case cites with approval *Kelly v. Schultze*, 12 Heisk. 218; *Choate v. Tighe*, 10 Heisk. 621; and *Pemberton v. King*, *supra*. Mr. Justice Cooper was

one of the authors of the Code, and in delivering this opinion clearly points to the inevitable result that, as to judgments and executions, leaseholds are now real estate. But see *Buhl v. Kenyon*, 11 Mich. 249, where a contrary doctrine is asserted, under a similar statute, by a court entitled to the utmost respect.

In the view I have taken of this case it is unnecessary to examine the question so much argued, whether the adjudication of these questions in *Dawson v. Daniel*, *supra*, on the application for a *vend. ex.*, is *res adjudicata* of the questions now made by this bill. I think it was not such an adjudication as precludes either Daniel or those claiming under him from resisting the title of the execution creditor in any appropriate way. The only question there, was whether a *vend. ex.* should issue, and that proceeding could not be converted into a trial upon affidavits of the right of property. It was a bare motion, from which not even a writ of error could be sued. *Boyle v. Zacharie*, 6 Pet. 656.

Let decree be entered declaring that Dawson is entitled to the money, and, after paying the costs of the suits at law, including the marshal's commissions for sale, the balance may be paid to him. The costs of the original and supplemental bills having been already paid out of the funds, the costs incident to the cross-bills, and all costs since the agreed decree, will be paid by Freeman out of the funds in his hands as trustee. But all the parties may have a decree for their costs against Daniel.

Decree accordingly.

MCCRACKEN v. COVINGTON CITY NAT. BANK OF COVINGTON, KY.*

(Circuit Court, S. D. Ohio. December 3, 1880.)

1. **ATTACHMENT—OHIO REV. ST. § 5521**—"DEBT OR DEMAND ARISING UPON CONTRACT."—Section 5521 of the Ohio Revised Statutes, prescribing the cases in which an attachment may issue, provides that "an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state, for any claim other than a debt or demand arising upon contract, judgment, or decree, or for causing death by a negligent or wrongful act." *Held*, that an action against a foreign corporation to recover damages for instituting suit in violation of a contract for the extension of the time of payment upon a note, and wantonly and maliciously attaching plaintiff's property therein, whereby plaintiff's credit was greatly injured, was not an action for "a debt or demand arising upon contract," within the meaning of said statute, and that an attachment could not issue therein.
2. **SAME—NATIONAL BANKING ASSOCIATIONS—U. S. REV. ST. § 5242**.—Whether section 5242, U. S. Rev. St., providing that no attachment shall be issued against a national banking association by a state court before final judgment is general, and applies to all national banking associations, *quære*.
Central Nat. Bank v. Richland Nat. Bank of Mansfield, 52 How. Pr. (N. Y.) 136.
3. **PLEADING—WRONGFUL PROSECUTION OF CIVIL ACTION—MALICE**.—In an action to recover damages for the wrongful bringing of a civil action, the petition must allege that such action was brought maliciously.
Stewart v. Sonneborn, 98 U. S. 187.
4. **SAME—MALICIOUS PROSECUTION OF CIVIL ACTION—TERMINATION OF ACTION**.—The petition in such action must also allege that the action, the bringing of which is complained of, has been terminated.
Stewart v. Sonneborn, 98 U. S. 187.
5. **SAME—SAME—SAME—ATTACHMENT**.—And this rule is not changed by the fact that the petition alleges, as the cause of action, the malicious issuing of an *attachment*, if the action in which it is issued and the attachment proceedings rest upon the same grounds, and must be determined together.

*Reported by Messrs. Florian Giaugue and J. C. Harper, of the Cincinnati bar.

6. JURISDICTION—ACTIONS AGAINST NATIONAL BANKS.—Whether an action against a national banking association can be brought only in the federal court within the district, or in a state court within the county or city in which it is located, *quære*.

Cadle v. Tracy, 11 Blatchf. 101.

Crocker v. Marine Nat. Bank, 101 Mass. 240.

7. PRACTICE—AMENDMENT.—Under what circumstances leave to amend will be refused.

On motion to discharge attachment and demurrer to petition.

E. P. Bradstreet, for plaintiff.

W. H. Mackoy, for defendant.

SWING, D. J. The action in this case was originally brought by the plaintiff in the court of common pleas of Hamilton county, Ohio, and was, upon petition of the defendant, removed into this court.

The petition in substance alleges that the plaintiff was liable to the defendant as accommodation indorser for A. M. Leathers; that Leathers went into bankruptcy, and by an agreement with the defendant, upon certain consideration, one year's further time from June 5, 1878, was given plaintiff to pay the same; that in violation of the agreement the defendant, on the eighth day of February, 1879, brought suit in the Benton chancery court of Kentucky against the plaintiff, on said acceptance, to recover from him the unpaid balance thereof, viz., \$1,939.44, and wantonly and maliciously and wrongfully caused an attachment to be issued in said action against the plaintiff, and caused the same to be levied upon the property of the plaintiff lying and being in the city of Covington, in the state of Kentucky, and garnished sundry people who were indebted to the plaintiff, including the tenants of the plaintiff's real property in said city.

Plaintiff says that said violation of said contract, and said attachment proceedings, have greatly injured his credit and standing as a merchant in this community and elsewhere, and will still more interfere with his business herein before described, and caused him to be damaged in the sum of \$100,000. He therefore prays judgment for \$100,000.

Under the statutes of Ohio the plaintiff filed his affidavit, setting forth that he was about to sue the defendant to recover the sum of \$100,000 due him on the contract; that the defendant was a foreign corporation, and a non-resident of the state of Ohio, and that the Third National Bank of Cincinnati had money and property belonging to defendant. Upon the filing of this affidavit an order of attachment was issued and served upon the Third National Bank of Cincinnati, who answered that they were indebted to the defendant in the sum of \$726.22. The attachment was also served upon the National Bank of Commerce of Cincinnati, Ohio, who answered that they were indebted to the defendant in the sum of \$1,323. A summons was also issued, and returned that the defendant was not found.

After the removal of the case into this court the defendant filed his motion to discharge the attachment for the following reasons: (1.) That the defendant is a foreign corporation, and a non-resident of the state of Ohio, and a resident and citizen of the state of Kentucky, and the claim does not arise upon contract, judgment, or decree, nor is it for causing death by a wrongful or negligent act. (2.) Because the attachment was issued contrary to the law in such case made and provided. The statutes of Ohio provide, (section 5521:) "In a civil action for the recovery of money the plaintiff may, at or after the commencement thereof, have an attachment against the property of the defendant upon the grounds hereinafter stated: *First*, when the defendant, or one of the several defendants, is a foreign corporation, or a non-resident of this state." And the latter clause of the section provides: "But an attachment shall not be granted on the ground that the defendant is a foreign corporation or a non-resident of this state for any claim other than a debt or demand arising upon contract, judgment, or decree, or for causing death by a negligent or wrongful act." The defendant in this case is a foreign corporation, and a non-resident of the state, and the sufficiency of the first reason assigned for the discharge of the attachment rests upon the character of the claim upon which this

action is instituted. The petition alleges that there was a contract of forbearance to bring suit for one year on a claim against plaintiff, and that, in violation of the contract, defendant brought suit, and wantonly and maliciously and wrongfully caused an attachment to be issued in the action, which was levied upon the property; that said violation of said contract and said attachment proceedings have very greatly injured his credit and standing, whereby he has been damaged.

The affidavit for an attachment says plaintiff's claim is upon a contract, and the learned counsel in his brief says that the action arises upon a contract, viz., for the violation of a contract; but I confess that I have had great difficulty in determining from the petition the precise character of this action—whether it is an action for the violation of the contract of extension by the bringing of that suit, or whether it is an action for wantonly, maliciously, and wrongfully issuing an attachment in the suit thus brought; whether the allegation in regard to the attachment is to be treated as simply an incident connected with the bringing of the suit, or whether the wrongful issuing of the attachment is the real cause of action. If the former, then the question arises whether the case made by the petition in that respect would be for a claim upon a contract such as is contemplated by the clause of the statute referred to, which authorizes an attachment to issue. If it be an action for wrongfully issuing an attachment, it is very clear that no attachment could issue, for it would not be a claim for a debt or demand arising upon contract.

I have been somewhat at a loss to determine whether the action is the one or the other; but upon a full examination of the petition I have determined that it is not an action for a debt or demand arising upon contract, such as is contemplated by the statute of Ohio, and that, therefore, no attachment could have legally issued against the defendant, who is a foreign corporation. It is, however, provided by section 5242 of the Statutes of the United States that no attachment

shall be issued against a national banking association by a state court before final judgment. But it is contended by the learned counsel for plaintiff that this provision is intended to apply to such associations as were in insolvency, and being wound up. In *Central Nat. Bank v. Richland Nat. Bank of Mansfield*, 52 How. (N. Y.) 136, it was held that the provision was general, and applied to all national banking associations. But whether this be the correct construction it is not necessary now to determine, for, under the statutes of Ohio, and for the reasons already assigned, the attachment was issued without authority of law, and must, therefore, be discharged.

To the petition the defendant has filed a general demurrer, stating as a cause therefor that the petition does not contain facts sufficient to constitute a cause of action. The determination of this demurrer must depend upon the cause of action as made by the allegations of the petition. If the petition be regarded as setting forth as the cause of action the violation of the agreement between plaintiff and defendant for an extension of time to plaintiff upon his liability as an indorser by the bringing of an action before the lapse of the time for which plaintiff claims that his liability was extended, then the plaintiff has no cause of action unless he should allege that such suit was brought maliciously. In the absence of malice no damages can be recovered by a defendant who has defeated a plaintiff in a civil suit, as, in the eye of the law, the costs recovered by the defendant in the civil suit will compensate him. *Stewart v. Sonneborn*, 98 U. S. 187. On the other hand, if this action be considered, as the court has already treated it in disposing of the motion, as an action for wrongfully and maliciously suing out an attachment, then the plaintiff here cannot maintain his action, as he fails to allege that the proceedings began against him wrongfully, and maliciously have come to end.

It is true that if the attachment can be discharged without regard to the cause of action, then, upon the discharge of the attachment, the plaintiff might maintain an action for wrongfully and maliciously suing out an attachment. Thus, in the

cases reported in 9 Ohio Rep. 103, 104, (*Tomlinson v. Warner*,) and 8 Ohio State Rep. 548, (*Fortman v. Rottser* and *Webb v. Moler*,) the attachments were predicated upon facts independent of and not connected with the cause of action stated in the petition, and the truth or falsity of which could be determined irrespective of the cause of action, so that in both cases the attachments could have been discharged, and still the plaintiffs might have been entitled to judgments upon the claims asserted by them. In this case, however, it is not denied that the plaintiff was a non-resident of Kentucky, and if the bank had a cause of action against McCracken, then McCracken, being a non-resident of Kentucky, the bank had the right, under the laws of Kentucky, upon the commencement of its action in Kentucky against McCracken, to attach his property in that state.

Whether, therefore, such attachment of McCracken's property in Kentucky was wrongful or not cannot be determined until it be determined whether the bank had a cause of action against McCracken.

The plaintiff having failed to allege that the action in Kentucky has come to an end, the demurrer of the defendant to the petition must be sustained. This point has already been decided in the case of *Stewart v. Sonneborn*, 98 U. S. 187, cited and relied upon by counsel for defendant.

There is another question which has presented itself to the court, in the examination of this case, which was not argued by counsel in the briefs filed by them, namely, whether the court has jurisdiction over this case. In the cases of *Cadle, Jr., v. Tracy*, 11 Blatchf. 101, and of *Crocker v. Marine Nat. Bank of N. Y. City*, 101 Mass. 240, in which section 57 of the act of June 3, 1864, was construed, it was held that a national banking association could be sued only in the federal court within the district in which such association may be established, or in a state court in the county or city in which such association was located.

Whether the law in regard to suits against national banks has been changed by subsequent legislation so that the cases

referred to would no longer be applicable, this court has not considered, inasmuch as it is not necessary to a complete determination of the questions now before the court in this case, the ground first stated being sufficient to sustain the demurrer.

BAXTER, C. J., concurred.

Upon an application by the plaintiff for leave to amend his petition—

BAXTER, C. J., said: In the argument it was admitted by counsel for plaintiff that the action, the bringing of which is complained of in the petition, has not been terminated. From the facts admitted, it appears that the plaintiff cannot so amend as to present a cause of action. We regard the action as extremely vindictive in its character. The suit against McCracken in Kentucky was for the sum only of \$1,900; it was not alleged that an excessive amount of property had been attached. The attorney for McCracken had just stated, in answer to a question by the court, that his client was worth \$50,000 over and above his indebtedness, and we cannot understand how it was possible, under such circumstances, for the plaintiff, McCracken, to have sustained damage in a sum twice as great as his entire wealth. We will, therefore, overrule the motion for leave to amend, and direct a judgment to be entered for the defendant.

FARMERS' NAT. BANK OF GREENVILLE, OHIO, v. GREEN and others.*

(Circuit Court, S. D. Ohio. December 3, 1880.)

1. JURISDICTION OF PROBATE COURTS IN OHIO—PROCEEDINGS TO SELL REAL ESTATE FOR THE PAYMENT OF DEBTS.—Probate courts in Ohio, in a proceeding by an administrator to sell real estate for the payment of debts, have jurisdiction to ascertain and adjust the liens thereon, settle priorities among lienholders, and apply the proceeds of sale in satisfaction thereof, in the same manner and to the same extent as a court of equity might in like proceedings.
2. SAME—ESTOPPEL—PARTIES.—Its findings and judgments in such proceedings are conclusive against the parties thereto, and it is immaterial as to their effect whether such parties shall appear and answer to the issues and claims made or not, or whether such claims or issues be presented in the petition, or in the other pleadings in the cause.

On demurrer to the first defence in the answer.

Knox & Anderson, for plaintiff.

Bateman & Harper, for defendant.

BAXTER, C. J., (*orally*.) It seems that Francis Waring, who was the husband and intestate of E. J. Waring, the administratrix now before the court, gave a note for \$2,000 to the plaintiff for money borrowed; and James A. Ries and John W. Green were his sureties for the payment of said note, and upon that note the present suit is brought. For the protection of these sureties Waring executed a mortgage upon his real estate to indemnify them against their liability as sureties. Upon the death of the principal the administratrix filed a petition in the probate court of Drake county, Ohio, for the payment of debts, praying for a sale of the land of said Francis Waring, in which she made Ries and Green, the sureties, together with the bank, parties, and asked that the amount of the lien be ascertained and declared, and that the land be sold to the end that she might have the benefit of the surplus remaining after paying the note. The court heard the case with all these parties before it, and ascertained and decreed that the only amount due on the note for \$2,000 was \$748.49.

*Reported by Florian Giauque and J. C. Harper, of the Cincinnati bar.
v.4,no.7—39

These securities plead that state of facts, and say that that is an adjudication which declares and fixes the amount which they are entitled to pay; that they have a lien for that amount, and no more; and that the bank, the plaintiff in this case, being a party before the probate court, is bound by that finding, and is estopped from demanding anything further from these defendants, the sureties.

The validity of that plea depends upon the peculiar laws of Ohio. It is claimed by the bank that it is not an estoppel, because there was no issue made up between the bank and the other parties; that it was a controversy between the administratrix and the sureties upon the note; and that they cannot be estopped, because they made no issue, and were not, in fact, necessary parties to that proceeding. Independently of the statute of Ohio, conferring jurisdiction on the probate court, the proceeding must have been one in equity. Mrs. Waring would have had a right to have gone into a court of chancery and stated to the court that a mortgage had been executed in favor of these parties to indemnify them against the payment of the \$2,000 note; that all but \$748.49 had been paid, and that their lien, therefore, was only against the payment of this balance, and that she wanted the equities and rights of these parties adjusted; and she could have brought in the bank before the court, and the court could have taken, and ought to have taken, jurisdiction and cognizance of the matter, and proceeded to hear and determine and fix and adjudicate the balance due upon the note, and give a decree to that effect which would have been binding upon the parties.

This idea that, because they did not make an issue, they are not bound by that adjudication, is not in our opinion maintainable. Any one of a number of distributees may file a bill against an administrator for an account. He is bound to make all the distributees parties. If they do not join him in the prosecution of the suit, he must make them defendants. They are in that way brought before the court. They may interpose no defence, and possibly make no answer or take no active part in the proceedings; and on an issue made

between a plaintiff, as one of the number of distributees, and an executor, for an account, an account is had and confirmed by the court, it would, as a matter of course, bind all the legatees or distributees, and no one could afterwards bring a suit, and ask to have an accounting in his own favor, upon the ground that he was merely made a party defendant, and took no active part in the suit.

The jurisdiction of the probate court in this particular is as broad as that of a chancery court. In law persons are compelled to take definite positions either as plaintiffs or defendants, but in equity they may be assigned to any position. There may be 10 or 20 interested in the prosecution of a suit, but only one of them willing to assume the responsibility of commencing an action. He cannot force those who are interested in common with him to become parties plaintiff, and he is compelled, if they refuse to become parties plaintiff, to make them parties defendant, which he does, and brings them before the court, and they, being parties before the court, have a right to take exception to the finding of the court, and take the ordinary remedy for reviewing and reversing.

The statute of Ohio, relating to the sale of real estate for the payment of debts and distribution of proceeds, provides: "The probate court, or court of common pleas, in which such action may be pending, shall have full power to determine the equities between the parties, and the priorities of lien of the several lienholders on said real estate, and to order a distribution of the money arising from the sale of such real estate, according to the respective equities and priorities of lien, as found by the court." Ohio Rev. St. 1880, § 6145.

This statute gives the probate court the same power which a court of chancery would have, and the plaintiff, the administratrix of the estate, had a right to have the court ascertain the amount due upon the note, and to have that fixed and adjudicated; and the court having power to decide and determine all the equities between the parties, and to determine the priorities of liens, the judgment of the probate court in that case finding that there was only a balance of \$748.49 due upon

the note instead of the full face of it, and that Green the Ries, the sureties, only had a lien to that extent, and ordering a sale of the property, and an appropriation of the money upon that basis, in a suit in which the bank was a party, and from which no appeal was taken, would be conclusive. The plea is therefore a good one, and the demurrer is overruled.

FARMERS' NAT. BANK OF PORTSMOUTH, OHIO, v. HANNAN,
Adm'r, etc.*

(Circuit Court, D. Ohio. November 24, 1880.)

1. **CONTRACT—CONSTRUCTION—ACTION AT LAW—SUBROGATION.**—The stockholders of the Boone Mining & Manufacturing Company entered into the following agreement: "We * * hereby mutually agree with each other that they will each be responsible in mutual degree for all paper negotiated by the agent of the company for the use and benefit of the company; and should any paper so negotiated by the agent with the individual indorsement of one member be unprotected by the official agent by reason of want of funds, then, in such case, the parties to this agreement be each and severally bound for the payment of such paper in mutual proportions; and this agreement shall continue in force until the payment of all such claims have been made." In an action upon this contract by the holder of the paper of such company, indorsed by one of the parties to said agreement, against another one of the parties to said agreement, (both the corporation and the indorser being insolvent,) *held*, that this agreement was a contract between the shareholders, and that a holder of the paper of the company could not maintain an action at law against the parties thereto. His remedy was by a suit in equity to be substituted to the rights of the indorser.
2. **PLEADING—BILL IN CHANCERY—ACTION AT LAW.**—What allegations and circumstances show the petition to be for an action at law, and not a bill in chancery, decided.

On demurrer to the amended petition. The facts appear in the opinion.

Coppock & Coppock and Stallo & Kittredge, for plaintiff.

E. A. Guthrie, for defendant.

*Reported by Messrs. Florian Giauque and J. C. Harper, of the Cincinnati bar.

BAXTER, C. J., (*orally*.) In this case the stockholders of the Boone Mining & Manufacturing Company, on the twenty-first day of February, 1871, entered into an agreement between themselves, which is as follows:

"CINCINNATI, February 21, 1871.

"We, the undersigned, shareholders of the capital stock of the Boone Mining & Manufacturing Company, hereby mutually agree with each other that they will each be responsible in mutual degree for all paper negotiated by the agent of the company for the use and benefit of the company; and should any paper so negotiated by the agent with his individual indorsement of one member be unprotected by the official agent by reason of want of funds, then, in such case, the parties to this agreement be each and severally bound for the payment of such paper in mutual proportions; and this agreement shall continue in force until the payment of all such claims have been made.

"J. H. GUTHRIE.

"J. E. WYNNE.

"M. F. THOMPSON.

"JOHN WYNNE.

"D. M. DAVIS.

"J. & C. REAKERT.

"J. W. G. STACKPOLE."

It seems that one of the parties to this agreement and a shareholder of the corporation indorsed a note of the corporation, and that note was negotiated for value to the plaintiff in the suit. The corporation and also this indorser have failed, and the holder of this paper seeks to have redress against one of the parties to this contract. We entertain the opinion that this contract between these shareholders is a contract between themselves; that it was not made to apply to this plaintiff, and that while he may go into a court of chancery, and have relief over against the several parties to the contract,—in other words, enforce the rights which the party who indorsed the paper is entitled to, and be substituted to the rights of that party, and compel the payment

of their proportionate share of this note,—no such right exists at law; that the holder of this paper cannot sue the parties to this contract at law.

That brings up the question whether this is an action at law or a bill in chancery. The petition begins: "The said plaintiff, the Farmers' National Bank of Portsmouth, Ohio, states to the court, by way of amended petition, that it is a national banking association," etc., etc., and goes on and states the facts, and it avers that by reason of these facts the defendant became indebted to the plaintiff, treating it as a paper upon which they could properly sue, and that they had direct legal rights under it and not equitable; and the conclusion is a prayer for judgment; and we notice, upon the original petition, that the plaintiff also took the same view of it, for he says: "Issue summons; civil action for money only; amount claimed, \$5,320."

We cannot come to any other conclusion than this is an action at law, and that an action at law upon this state of facts cannot be sustained. The demurrer will be sustained, and the petition dismissed.

DWIGHT and another v. MERRITT.

(Circuit Court, S. D. New York. ———, 1880.)

1. SUMMONS.—In the United States courts a summons must issue from the court, and be signed by the clerk, and sealed with the seal of the court.

Peaslee v. Haberstro, 15 Blatchf. 472.

2. AMENDMENT.—In those courts a summons cannot be amended by the subsequent addition of the signature of the clerk, and the seal of the court.

Peaslee v. Haberstro, *supra*.

Motion to Set Aside Summons.

Thomas J. Rush, for plaintiffs.

Stewart L. Woodford, Dist. Att'y, for defendant.

BLATCHFORD, C. J. In this case an attempt has been made to commence a suit at common law, in this court, by serving

on the defendant a paper purporting to be a summons, in the form prescribed by the statute of New York for commencing a civil action. It is signed by the plaintiffs' attorney, but is not under the seal of the court, nor is it signed by the clerk of the court. Section 911 of the Revised Statutes of the United States provides that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof." A summons, or notice to the defendant, for the commencement of a suit, is certainly process, quite as much as a *capias* or a subpoena to appear and answer is process. The statute intends that all process shall issue from the court, where such process is to be held to be the action of the court, and that the evidence that it issues from the court and is the action of the court shall be the seal of the court and the signature of the clerk. It is clear that a signature by the plaintiffs' attorney, without a seal, and an issuing from the office of such attorney, cannot be substituted. There is nothing in the provisions of section 914 of the Revised Statutes as to the conformity in practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the courts of the United States, to the practice, pleadings, and forms and modes of proceeding in like causes in the state courts, which abrogates the provisions of section 911. The two must be so construed as to stand together.

The question here presented was decided by the circuit court for the northern district of New York in *Peaslee v. Haberstro*, 15 Blatchf. 472, where it was held that the summons must be signed by the clerk and be under the seal of the court, and that section 911 is not inconsistent with or repealed by section 914. The principle of that decision has been generally adopted in applying section 914 to the practice of the federal courts in suits at common law. That principle is that where congress has, by statute, pointed out a specific course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceed-

ing sought to be pursued, such legislation must be followed, although opposed to the forms and modes of proceeding prevailing in the state courts, and established by state statutes. *Easton v. Hodges*, 7 Biss. 324; *Beardsley v. Littell*, 14 Blatchf. 102.

The defendant moves to set aside the summons, because of the foregoing defects, before appearing generally in the suit; and the plaintiffs ask to be allowed to amend the summons, *nunc pro tunc*, by having the seal and signature added. It is alleged that the statute of limitations would be a bar to a new suit. Power to amend the process is said to be given by sections 948 and 954. That power is power to amend a defect in process, and power to amend a want of form in process. But there must first be a process to be amended. There must be something to amend, and to amend by. This paper is no process. The process which can be amended, under the power conferred, is process issuing from the court. This paper never issued from the court. If it had in fact issued from the court and was signed by the clerk, but had no seal, or had a seal but was unsigned, what it had might, perhaps, be accepted as showing that it issued from the court, and the lacking particular might be supplied. In *Peaslee v. Haberstro* it is said: "If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is, there is no summons in the nature of process known to this court." In that case there was no seal and no signature of the clerk, and the summons was set aside.

The motion of the defendant is granted, and the motion of the plaintiffs is denied.

MACKAY, Administratrix, etc. v. CENTRAL R. Co.

(Circuit Court, S. D. New York. November 8, 1880.)

1. ADMINISTRATION—POWER TO SUE—LAW OF FOREIGN STATE.—An administrator in one state cannot recover damages for the benefit of the widow and next of kin in the courts and under the authority of a statute of another state.

Richardson v. N. Y. Central R. Co. 98 Mass. 85.

Woodward v. Michigan Southern, etc., R. Co. 10 Ohio St. 121.

SHIPMAN, D. J. The complaint in this case alleges that on April 23, 1874, Louisa S. Mackay died, and subsequently letters of administration upon her estate were duly granted to the plaintiff, a resident of the city of New York, by the surrogate of the county of New York; that the plaintiff duly qualified and entered upon the discharge of the duties of said office; that the defendants are a corporation created under the laws of the state of New Jersey, and are common carriers of passengers between the cities of New York and Jersey City, and on April 23, 1874, received Louisa S. Mackay, in New York, into one of their ferry-boats as a passenger, to be transported to Jersey City, and so unskillfully conducted themselves that in consequence of their negligence she fell between the end of the boat and the pier, at Jersey City, and was drowned. The complaint further alleges that by an act of the legislature of New Jersey, passed March 3, 1848, it was provided: "(1.) Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, and the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (2.) Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every

such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: *provided*, that every such action shall be commenced within 12 calendar months after the death of such deceased person."

After the jury was empanelled, and before any evidence was taken, the defendants moved to dismiss the complaint, because the plaintiff, an administratrix in the state of New York, and appointed solely under its laws, has no power or authority, by virtue of the statute of the state of New Jersey, to sue for and recover damages for the death of the intestate—a question which, it was conceded by the plaintiff, is clearly presented upon the pleadings. It is manifest that the right of an administrator to recover for the pecuniary injuries resulting from the death of the intestate to the widow and next of kin is unknown to the common law, and exists only by statute. It has been held that such a statute has no extraterritorial force, and that no recovery can be had thereon for an injury which was committed beyond the limit of the state by whose legislature the statute was enacted. *Whitford v. Panama R. Co.* 23 N. Y. 465; *Beach v. Bay State Co.* 30 Barb. 433.

The alleged injury in this case was received in New Jersey, and the question which arises is whether a New York administrator can, by virtue of the appointment of the surrogate of the county of New York, recover the damages which a personal representative is authorized to sue for and obtain for the benefit of the widow and next of kin by the statute of the state of New Jersey, and not by the laws of the state of New York. An administrator takes his title by force of the local law and the grant of administration. *Marcy v. Marcy*, 32 Conn. 308.

A New York administrator exists by virtue of his appoint-

ment under the laws of that state, and his powers and duties are prescribed by its statutes. Another state cannot impose upon him liabilities, obligations, or duties different from those which the laws of New York impose, for he takes upon himself such obligations only as the laws of the state which appointed him create. Neither can the statutes of another state impart to the New York administrator powers which the New York statutes do not confer. He is the creation of the local law, and, until additional authority is derived by virtue of an additional appointment, he has only the power which the local law confers.

The right which the plaintiff is supposed to have received by the statute of New Jersey is not a right to any property which are the assets of the deceased, or of her estate, but is a right to sue as trustee of a fund which may be obtained for the next of kin,—a position in which she is not placed by the law under which she was appointed. In order to execute such a trust the trusteeship must have been conferred, and the only title which the plaintiff has acquired to this trusteeship is by virtue of her appointment as administratrix by the surrogate under the laws of New York. Its laws do not confer upon the representatives of deceased persons any power to obtain damages for injuries resulting in death which the deceased received in another state. This question has been considered by the supreme courts of Massachusetts and of Ohio. In *Richardson v. N. Y. Central R. Co.* 98 Mass. 85, a Massachusetts administratrix sued a New York corporation for damages, by reason of the death of the plaintiff's intestate through the negligence of the defendants in New York. The right to sue was founded upon a New York statute which is very similar to the New Jersey statute. The court say: "The plaintiff is the administratrix, appointed under the law of Massachusetts. Her right to sue in this commonwealth in her representative capacity is upon causes of action which accrued to the intestate, or which grow out of his rights of property or those of his creditors. The remedy which the statutes of New York give to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin,

is not of such a nature that it can be imparted to a Massachusetts executor or administrator *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representative of the deceased. The only construction which the statute can receive is that it confers certain new and peculiar powers upon the personal representative in New York. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one state to the tribunals of another." To the same effect is the decision in *Woodward v. Michigan Southern, etc., R. Co.* 10 Ohio St. 121.

The complaint is dismissed.

TIERNAN v. BOOTH.

(Circuit Court, N. D. Illinois. October 13, 1880.)

1. WRIT OF ERROR—SUPERSEDEAS.—The fact that a citation was not presented to and signed by a judge within 60 days after the entry of judgment, will not necessarily prevent a writ of error from operating as a *supersedeas*.

Motion for Writ of Possession.

George & William Burry, for motion, cited *Sage v. R. Co.* 93 U. S. 417; *Kitchen v. Randolph*, Id. 86; *City of Washington v. Denison*, 6 Wall. 496; *Stockton v. Bishop*, 2 How. 74; *Rubber Co. v. Goodyear*, 6 Wall. 156; *Silver v. Ladd*, 6 Wall. 440; *Palmer v. Donner*, 7 Wall. 541; *U. S. v. Hodge*, 3 How. 534; *Bacon v. Hart*, 1 Black, 38; *U. S. v. Curry*, 6 How. 113; *Hogan v. Ross*, 11 How. 297; *Feret v. Hill*, 15 Common Bench, 207; *Conkling's Treatise*, 671.

Needham & Miller, for defendant, cited *Sage v. R. Co.* 96 U. S. 712; *Carroll v. Dorsey*, 20 How. 207; *U. S. v. Yates*, 6 How. 605; *Alviso v. U. S.* 5 Wall. 824; *U. S. v. Gomez*, 1 Wall. 701; *Bangs v. R. Co.* 23 How. 1; *Davison v. Lanier*, 4 Wall. 447; *Barton v. Forsyth*, 5 Wall. 190; *Villaboes v. U. S.* 6 How. 89, 91.

DRUMMOND, C. J. In this case a judgment was rendered by this court in favor of the plaintiff, in an action of ejectment, on the thirteenth day of December, 1879, and within the proper time a bond was filed by the defendant, with security approved by the court, in an amount sufficient to make it a *supersedeas*. A writ of error was seasonably sued out, and a copy was also left in the clerk's office for the opposite party, in conformity with the statute. In all respects, therefore, the necessary steps were taken by the defendant to make the writ of error a *supersedeas*, unless one is lacking, viz.: because the citation was not signed by the judge until the fourth day of September, A. D. 1880. The practice does not seem to be uniform in the various circuits courts of the United States as to the manner of making a writ of error a *supersedeas* by the action of the court. It seems to be conceded that it is not necessary, provided everything has been done required by the statute, for a court or the judge to make an order that the writ of error is a *supersedeas*. It becomes so *per se* upon compliance with the statute. The practice in this circuit has usually been to treat a writ of error, upon the execution and approval of a sufficient bond and the issue of the citation, as a *supersedeas* without any express order of the court or judge. It is generally understood, between parties and by the court, whether the bond that is offered, (being sufficient in amount and the security adequate,) is intended and does operate as a *supersedeas*. If that is so understood by the counsel and the court, no application is made for an execution or a writ of possession, as the case may be; and therefore no order is generally entered in such cases. At the same time, the practice has been occasionally for counsel to ask that a special order shall be entered by the court or judge declaring the writ of error a *supersedeas*, and when so desired the order has been made. The language of the statute is, (section 1000:) "Every justice or judge signing a citation on any writ of error shall * * * take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect." Undoubtedly the general rule is that the signing the citation and taking the security are simultaneous

acts. The statute seems to imply that they are, and to impose as a duty on the judge, when he signs the citation, that he shall then take good and sufficient security. In practice the citation is usually prepared by the counsel and presented to the judge for his signature. In fact, it may be stated, I think, that this is the universal practice. In consequence of this, and because no citation was presented to the judge for signature, none was signed in this case, and it was not until the fourth day of September, 1880, when it was ascertained that no citation had ever been actually signed or served, that the citation was presented to the judge for his signature, which was then affixed. The writ of error was returnable to the first day of the present October term, and the citation was issued and served on the plaintiff to appear on the first day of the October term of the supreme court for this year, to answer the writ of error.

It will be seen from this statement that if the plaintiff is entitled to a writ of possession in this case, it will be in consequence of the technicality of a citation not having been prepared and presented to the judge and signed within 60 days after the judgment was entered. I do not feel inclined to sustain a technicality of this kind under the facts of this case. Undoubtedly it is competent for the supreme court to grant a *supersedeas*, even where none has been allowed by the circuit court. But here all that was necessary to make the *surpersedeas* effectual was the citation and signature of the judge within 60 days after the judgment was rendered. It seems to me, for all practical purposes, the plaintiff having been served with a citation before the October term of the supreme court, and notice thus being brought home to him of the writ of error and of the term to which it was returnable, and a bond having been executed, which was treated by the court as a *supersedeas* bond, it is sufficient to entitle the defendant to take the judgment of the supreme court upon the merits of the case itself, before the plaintiff can call on this court for a writ of possession. At any rate, if it be a matter of doubt, I prefer to take this view of the case in order that the plaintiff may avail himself of any error, if

any has been committed by this court, and take the opinion of the supreme court upon the question. If that court, upon proper application, shall be of opinion that under the facts in this case the plaintiff is entitled to a writ of possession, this court will follow that ruling without any order being made, and upon being informed that the supreme court has made such ruling.

NORTON, Assignee, v. BILLINGS and others.

(Circuit Court, N. D. Illinois. November 27, 1880.)

1. VENDEE—FRAUD—PRIMA FACIE EVIDENCE.—A sale by a retail merchant of his whole stock, within the period limited by the bankrupt act, is *prima facie* evidence of fraud against the vendee.
2. SAME—CONSIDERATION—PRESUMPTION.—Such presumption cannot be overthrown by proof that the full value of the property was paid in ignorance of the insolvency of the vendor.
Walbrun v. Babbitt, 16 Wall. 577.
3. SAME—FRAUD—PRESUMPTION.—Such presumption can only be overcome by proof on the part of the vendee that he took the proper steps to find out the pecuniary condition of the vendor.
Walbrun v. Babbitt, *supra*.
4. SAME—EVIDENCE.—It is competent for the vendee to show, however, that the insolvent vendor intended in good faith to use the means acquired from the sale in the payment of his debts, *pro rata*, among his creditors.

In Bankruptcy.

J. W. Ela, for plaintiff.

Sidney Smith, for defendants.

DRUMMOND, C. J. Nowlin & McElwain had been for several years engaged in business as jewelers in the city of Chicago, prior to the spring of 1870, when they became embarrassed, and found it necessary to demand an extension from their creditors. McElwain accordingly went to New York in May of that year, where the firm was indebted to different merchants, to the amount of more than \$20,000. While there he made a statement of the condition of the affairs of the firm

in Chicago to different creditors, from which statement it appeared that the firm had assets to the amount of about \$39,000, and owed about \$23,000. In the statement was included the amount of indebtedness in Chicago, which was set down at about \$2,000. Upon the representations thus made to the New York creditors an extension was granted, not for the whole time demanded, but so as to relieve the parties from the necessity of meeting their paper, then about to fall due.

McElwain returned to Chicago, and they continued their business until the following September, when a general assignment or sale was made by the firm of all their stock to Henry F. Billings, the principal defendant in this case. In October of the same year two of the New York creditors came to Chicago to inquire into the condition of the firm, and the result was a petition in bankruptcy against the firm, and a decree of the court finding that they were bankrupts.

The evidence shows an inventory was taken of the stock of the firm in May, 1870, amounting to \$30,000, and that there was an inventory taken with a view of the sale to Billings, which amounted to about \$17,000. Considerable negotiations took place between Billings and McElwain before the trade was consummated and the assignment made. McElwain proposed that Billings should buy out Nowlin, the other partner, which proposition was declined by Billings. The offer made by Billings, which was finally accepted, was that the goods should be invoiced,—recently purchased goods at their cost, and goods which had been on hand for some time at current prices for goods of like qualities, and the fixtures at cost,—and from the amount thus ascertained a discount of 25 per cent. should be made. The price thus obtained was \$13,040.58, upon which basis the contract was made, and the property turned over to Billings, who immediately had a new sign made in his own name and placed over the door, and Nowlin & McElwain were retained for a few months to assist in carrying on the business. One of the reasons given by McElwain for the sale was that the time during which they were to be partners had expired, and that Billings was him-

self at that time out of employment, and desired some occupation, although he had no knowledge of the business in which the firm was engaged. A very small sum was paid in cash by Billings at the time, and notes were given for the balance due, some of which were negotiated by the firm; and afterwards a new arrangement took place, by which the old notes were taken up, and new ones given, because of the amount paid for the lease of the store, which Billings claimed was too large. From this sale the firm realized about \$10,000, none of which was paid to the New York creditors.

The evidence shows that the statement made by McElwain to his creditors in New York, of the amount of the Chicago indebtedness, was not correct; that it largely exceeded the amount as stated by him, and it would seem that the proceeds of this sale were used in the payment of the Chicago indebtedness, and for the living expenses of the members of the firm. It should also be stated that there is evidence tending to show that McElwain, between the time when he obtained the extension from the New York creditors and the sale made to Billings, had taken from the stock some watches and other articles of jewelry which are not very satisfactorily accounted for; but there seems no reason to doubt that Billings obtained the amount of the goods inventoried to him at the time of the assignment. Neither can there be any doubt, under the evidence, that the price which he agreed to pay was the full value of the goods. Billings paid the whole of the purchase money, taking up all the notes which were given by him. He, however, did not remain long in the business, but disposed of the whole stock in the following spring. McElwain seems to have been the man principally concerned in all the transactions which are here mentioned, Nowlin remaining passive, or merely assenting, as the facts were communicated to him, to what had been done by McElwain. At the time the proposition for an extension was made to the New York creditors, and at the time the assignment was made to Billings, the firm was insolvent. Whatever may have been their expectations in May, there can be no doubt that in September, when the transfer was made to Billings, they knew of

their insolvency, and made it for the purpose of giving a preference to some of their creditors, and so, as to them, it was fraudulent under the bankrupt law. The true course for them to pursue at the time was either to go into bankruptcy voluntarily, or to make an assignment for the benefit of all their creditors. The testimony of Nowlin is full of admissions of his knowledge of their insolvency on the first of September, 1870. At the time Billings made this purchase he seems to have been a man of some means. He states that he had no knowledge of the insolvency of the firm, nor of the extension that was given, and believed that their credit was very good; and the testimony of both Nowlin and McElwain does not show that Billings had knowledge of their condition at the time of the sale.

The question in controversy must, therefore, depend almost exclusively upon the true construction of the bankrupt law, as applied to the facts of the case as heretofore stated. There is no difficulty upon any other point than this: Had Billings reasonable cause to believe or had he knowledge of the intention with which the sale was made to him? As has been stated, there can be no doubt of the intention of the vendors. All the acts preceding and subsequent to the sale show that intention to have been in violation of the bankrupt law.

This was an assignment of all the debtor's property. Section 5130, Rev. St. U. S., re-enacting a clause contained in section 35 of the original bankrupt law, declares that if an assignment is made of a debtor's property, not in the usual and ordinary course of the business of the debtor, it shall be *prima facie* evidence of fraud. This firm was doing a retail business in Chicago at the time, and that which ordinarily belongs to jewelers. This, having been an assignment of the whole stock of the firm, must be considered not made in the usual and ordinary course of business, and, therefore, as well *prima facie* evidence of fraud against the vendee as the vendors. In other words, that fact of itself evidenced fraud to the vendee as well as the vendors. If this is correct, then the question which was discussed by the counsel as to the effect of the amendment of 1874 on the bankrupt law, requiring

knowledge on the part of the vendee, instead of reasonable cause of belief of the fraudulent intent, cannot arise, because if the facts conveyed to Billings the knowledge that it was a fraudulent act, then the only way to escape the consequences of that knowledge would be to avoid the language of the statute. In other words, to rebut the *prima facie* case made; and the question is whether that has been done in this case.

The case of *Walbrun v. Babbitt*, 16 Wall. 577, seems to imply that a sale, such as was made in this case, is within the meaning of the statute; and the opinion of the court declares that the purchaser cannot overthrow the legal presumption which arises from the fact, by showing that the full value of the property was paid in ignorance of the insolvency of the vendors. The court declares that the presumption of fraud arising from the unusual nature of such a sale can only be overcome by proof on the part of the buyer that he took the proper steps to find out the pecuniary condition of the seller. "All reasonable means," the court says, "pursued in good faith, must be used for this purpose." That the transfer of the whole of the debtor's property is not in the usual and ordinary course of business, seems to be sustained by numerous authorities, most of which are collected by Bump in the notes to section 5128 of the bankrupt law.

One circumstance ought not to be overlooked in considering the effect of this assignment upon Billings, and that is it was hardly supposable that a firm engaged in the business of this firm would be entirely free from debt. Undoubtedly it would have been competent for the vendee to show, if such was the fact, even if he had knowledge of the insolvency of the firm, that they intended in good faith to use the means acquired from the sale in the payment of their debts, *pro rata*, among their creditors, because the fact that the vendor is insolvent, and that is known to the vendee, does not of itself render a sale invalid under the bankrupt law. It must appear in addition that the assignment or sale was made with a view to prevent the property from being distributed under the bankrupt law, or to defeat or impair its provisions, or that the assignment was made in fraud of the law.

The *prima facie* case made against the vendee here cannot be said to have been met by any evidence which, fairly considered, rebuts the presumption made by the law. It may be said that it is a hard case against Billings, because he has paid the full value of the goods which he obtained; but the supreme court has declared, as already stated, that he cannot escape by showing that he paid the full value of the property in ignorance of the insolvency of the debtors.

The bill was filed in this case in the district court by the assignee of the bankrupts, in the early part of 1871, to set aside the sale as fraudulent; and the prayer of the bill is that the sale to Billings be declared void by the order of the court, and that he be decreed to deliver the goods and fixtures to the assignee, and to account to him for the value of such goods and fixtures as he may have disposed of since the sale made to him. This is followed by the prayer for general relief. Answers were made by Billings and the bankrupts denying the allegations of fraud charged in the bill, on which issue was taken, and proofs; and the original records of the case having been destroyed by the fire of 1871, were restored, and the case heard by the district court. That court, impressed, perhaps, by the fact that Billings had paid a full consideration for the goods, and the denial by him of all knowledge, at the time of the sale, of the insolvency of the bankrupts, dismissed the bill; but I feel constrained, notwithstanding the apparent hardship of the case as to Billings, to dissent from the opinion of the district court. It seems to me that the sale cannot be sustained consistently with the express declarations of the bankrupt law, and the opinion of the supreme court as to a sale of this character. I think the proof is satisfactory that it was a sale made not in the usual and ordinary course of business of the debtors, and, therefore, I shall reverse the decree of the district court, and hold that the plaintiff is entitled to a decree in his favor as assignee of the estate.

In re FORSYTH, Bankrupt.*(Circuit Court, D. Indiana. December 7, 1880.)*

1. BANKRUPT—DISCHARGE.—The discharge of an assignee in bankruptcy will not necessarily deprive the bankrupt of the right to a subsequent discharge.

In re Canady, 2 Biss. 75.

Petition for discharge after assignee has been discharged.

Robert E. Jenkins, for bankrupt.

No appearance for creditors.

DRUMMOND, C. J. On the thirty-first of August, 1878, the petitioner filed his petition in the district court, under the bankrupt law. On the fourteenth of December following he was adjudged a bankrupt, and on January 22, 1879, an assignee was appointed. The petitioner had no assets, and no claim was filed against him. On July 19, 1879, the assignee made application to the register to be discharged, stating that there were no assets belonging to the estate, and no claims had been proved; and on the nineteenth of July, 1879, the register, stating that there was no interest opposing, and that the assignee had performed all the duties required of him, and that the estate had been fully administered, discharged him from all liability as such assignee. In June, 1879, the petitioner wrote to the clerk of the court, making inquiry as to what had been done in his bankruptcy case. He received no answer to his letter, and in August he wrote again, repeating his former inquiry, and in answer to his second letter the clerk informed him that the estate had been settled, and it was too late to make his application for a discharge. On October 16, 1879, the bankrupt filed a petition in the district court, alleging the facts, and also stating that he believed his creditors were willing that he should be discharged, and that he had done no act to prevent his discharge, unless the omission to make application before the assignee was discharged from all liability had that effect.

The petitioner did not employ counsel on filing his original petition, nor in the application that was made to the district

court for his discharge. He stated that the costs in the case had not been paid, but that he was willing to make payment of all the costs; and in the petition in review to this court he alleges that he has paid all costs due. On the seventeenth of October, 1879, the district court refused to grant the application of the bankrupt for his discharge, and it is that order which is sought to be reviewed by the petition in this court. It is intimated, for there is no opinion of the district judge in the case, that the ground upon which the court disallowed the application of the bankrupt was that there had been a final disposition of the cause, and, therefore, it came too late. If this were so, it must have been because the discharge of the assignee from all liability was considered as a final disposition of the cause. But as there were no assets, and no claims proved against the estate, the discharge of the assignee was merely a formal matter, and, indeed, was unnecessary, having nothing to do, in one important particular, at least, with the final disposition of the cause. Without expressing any opinion as to the regularity of the proceeding before the register, it would seem that it should, in some form, come under the cognizance of the court. There is nothing to indicate that, in this record, nor to show when, if ever, the proceedings before the register were filed in the district court.

I had occasion to consider an application of this kind several years ago, *In re Canady*, 2 Biss. 75. That decision was made under the statute as it then stood, which declared that the bankrupt, at any time after the expiration of six months from the adjudication in bankruptcy, and within one year of the same, might apply to the court for his discharge. It was there held that there was a certain discretion in the court, if proper explanations were given for the delay, to grant the discharge, notwithstanding the application might be made after one year. It would seem as though the bankrupt ought not to be precluded from making an application, unless he has had notice of something to be done which shall constitute the final disposition of the cause. In this case he says he had no notice whatever of the action of the assignee or of the register. We think that a bankruptcy case may be

properly regarded as consisting of two branches—one connected with the estate and its distribution, where there is anything to distribute, and the other relating to the discharge of the bankrupt, which is the important object of the petition to the bankrupt court, so far as he is personally concerned. The law, as it was finally amended upon this subject by the act of 1876, declared that at any time after the expiration of six months from the adjudication in bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of 60 days, and *before the final disposition of the cause*, the bankrupt might apply to the court for his discharge.

While, in his application to the district court, the bankrupt stated that the costs had not been paid, it is now alleged that they have been; and it seems to me it would be rather hard in such a case as this to deprive the bankrupt of the benefit of his application, simply because of the omission to bring the matter to the attention of the court before the action of the register, upon the application of the assignee on the nineteenth of July, 1879. Unless the true construction of the law, as amended, deprives the court of the right to proceed and grant the discharge, it ought not to be refused, and I do not think that it necessarily follows from the language used that the court is deprived of all power upon the subject simply because the assignee has, in such a case as this, been discharged from all liability. It cannot be considered because of that there has been, in every respect, a final disposition of the cause. On the contrary, it would seem as though, in order to deprive the bankrupt of the right to make his application for a discharge, there should have been some action of the court to the effect that the case had been finally disposed of.

I shall, therefore, remit the cause to the district court, with instructions to allow the application of the bankrupt for his discharge, upon being satisfied that all the costs of the district and circuit courts have been paid.

In re VOETTER, Bankrupt.

(District Court, W. D. Pennsylvania. November 23, 1880.)

1. **BANKRUPTCY—SET-OFF.**—V. and B. were copartners in the live-stock business. V. was adjudged a bankrupt. At the time of his adjudication he was indebted to B. upon transactions not connected with the partnership. Upon a settlement of the partnership accounts there was a balance thereon due from B. to V. *Held*, that B. had the right to set off against the amount due from him to the bankrupt on the partnership transactions the independent debts due from the bankrupt to himself.

In Bankruptcy. *Sur* exceptions to register's report upon the claim of Ira F. Brainard.

Thomas C. Lazear, for exceptions.

Geo. W. Guthrie, *contra*.

ACHESON, D. J. This case comes before the court upon exceptions to the register's report in the matter of the claim of Ira F. Brainard. The question involved is one of set-off. The bankrupt and Brainard, at and prior to the time of the filing of Voetter's petition to be adjudged a bankrupt, were copartners in the cattle or live-stock business. Upon a settlement of the partnership business, since the bankruptcy of Voetter, it appears that a balance is due from Brainard to the bankrupt on the partnership accounts.

At the commencement of the bankruptcy proceedings Brainard held two notes of the bankrupt; one for \$1,000, then past due, and one for \$5,000, maturing in 30 days,—the consideration of each note being money loaned by Brainard to Voetter. Brainard was also surety for Voetter upon another note not then due. After the bankruptcy Brainard paid on this latter note \$3,950.

The learned counsel for Brainard has, I think, fairly stated the question for decision thus: Has Ira F. Brainard the right to set off against the amount due from him to the bankrupt, on a settlement of the partnership business of Voetter & Brainard, the debts due from the bankrupt to himself in transactions not connected with the partnership? The register decided against the right of set-off in an opinion which

is characterized by ability and research. But I am not persuaded, either by the reasoning of the register or the authorities cited by him, of the correctness of his conclusion. What is this case? It is one of mutual dealings—of cross-demands arising *ex contractu*; and, in my judgment, the right of set-off here claimed has its foundation in natural equity. Upon what just principle can Brainard be compelled to pay to the bankrupt's estate the balance in his hands arising from the partnership transactions, and come in with the other creditors for a mere *pro rata* dividend? It is said in *Holbrook v. The Receivers, etc.*, 6 Paige, 220, 231, that the natural equity to have mutual but unconnected demands between two parties who have been dealing with each other set off, is, as a general rule, superior to the claims of any other creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of set-off is claimed.

In *Gay v. Gay*, 10 Paige, 369, where one of two copartners in a mercantile firm filed a bill against his copartner for an account and settlement of the partnership transactions, and to obtain his share of the profits of the firm in the hands of the defendant, and the defendant at the time of the commencement of the suit was an indorser for the complainant upon notes on which the holders afterwards recovered judgments against such complainant, and the defendant, who was liable as such indorser, paid the judgments and took an assignment thereof for his protection and indemnity, before the termination of the suit for an account, it was held that the defendant had an equitable claim to have such judgments set off against the balance upon the partnership accounts found due to the complainant, who was insolvent; and this notwithstanding the complainant had assigned all his interest in the suit to a third person, pending the suit, but after the judgments had been assigned to the indorser.

Upon principle and authority, therefore, it may be assumed that, in the absence of bankruptcy proceedings, had Voetter filed a bill against Brainard for the settlement of their partnership transactions, the latter could have availed himself of the set-off he now claims upon showing Voetter's insolvency.

But why should the fact that Voetter has been adjudged a bankrupt prejudice Brainard? Surely, if anything is authoritatively settled, it is that an assignee in bankruptcy takes the bankrupt's estate subject to whatever equities the bankrupt himself was liable to.

On the subject of set-offs the language of the bankrupt law is as follows: "In all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." Section 5073, U. S. Rev. St.

The term *mutual credits* imports something more than that of *mutual debts*. Collyer on Part. § 1008. This has been repeatedly held under the English bankrupt law, which on this subject is substantially the same as ours.

In the leading case of *Rose v. Hart*, 8 Taunt. 449, 2 Smith's L. C. 293, it was held that the mutual credits within the meaning of the bankrupt law are credits which must, in their nature, terminate in debts; and this means, not credits which must, *ex necessitate rei*, terminate in debts, but credits which have a natural tendency to terminate thus. Blumenstiel's L. & P. in Bank. 285.

The case of *French v. Fenn*, 3 Doug. 257, in principle, is identical with the case in hand. There, Fenn and one Cox and another joined in an adventure to buy and sell pearls; and it was agreed that the money for the purchase should be advanced by Fenn, who was to receive interest from his associates on his advances made for them, and that the profit and loss should be equally divided between the three. Cox became bankrupt, and afterwards Fenn sold the pearls and received the money therefor. In an action by the assignees of Cox, to recover his share of the profits, it was held that Fenn was entitled to set off an independent debt due from Cox to himself.

I find no case arising under our bankrupt law which decides the precise question now before me; but many cases have carried the doctrine of set-off arising from mutual credits as far as I am asked to do here. Thus, *In re Dow*, 14 B.

R. 307, it was decided that a party who held stock of the bankrupt, with a power of sale, as collateral security for a certain debt which was overdue at the commencement of the proceedings in bankruptcy, if he exercised his power of sale after the bankruptcy, had a right to retain the surplus by way of set-off on another claim which he had against the bankrupt.

Is not the equity of Ira F. Brainard as clear as that of the creditor *In re Dow*? It seems to me that it is clearer, and that to deny him the right of set-off would be sheer injustice.

And now, November 23, 1880, the exceptions filed by Ira F. Brainard to the register's report are sustained; and it is adjudged and decreed that the set-off claimed by said Brainard be allowed.

MATTHEWS v. SHONEBERGER and another.

(Circuit Court, S. D. New York. ———, 1880.)

1. RE-ISSUE No. 2,386, granted October 30, 1866, for an improvement in bottle stoppers, *held, not infringed*.
2. PATENT No. 44,684, granted October 11, 1864, for an improved method of stopping bottles, *held, not infringed*.
3. CLAIM—CONSTRUCTION.—Every claim of a patent is to be construed as though it in terms in referred to the descriptive part of the specification.
4. SAME—SAME.—A claim for inserting a stopper through the mouth of a bottle, and then passing it upwards till it is closed tight against a seat inside, must be limited to the mechanism described, having the mode of operation described.
5. SAME—SAME.—A claim to a function of mechanism, aside from the structure of such mechanism, is not valid.

A. V. Briesen, for plaintiff.

G. V. N. Baldwin, for defendants.

BLATCHFORD, C. J. This suit is brought on two patents. One of them is a re-issue, No. 2,386, granted to the plaintiff, October 30, 1866, for an improvement in bottle stoppers, the original patent having been granted to Albert Albertson, as

inventor, August 26, 1862. This patent has expired. The specification says: "This invention consists in a stopper which always remains in the bottle, and which readily permits the introduction of any fluid into the bottle, and at the same time effectually prevents any discharge of it except when desired, and which is particularly adapted to bottles containing soda-water, wines, and all fluids having a generating fixed air, as the greater the pressure from such cause the closer and tighter is the stopper. An important feature of the invention, which distinguishes it from all previously-applied stoppers which remain in the bottle, is that it is inserted into the bottle through the neck without requiring the use of a separate or larger opening, or detachable cap, to permit its introduction. * * * The stopper represented * * * consists of a small metallic or other stem, A, upon the lower end of which is fixed a rigid button or disk, B, which is made of such a size as just to pass through the smallest part of the mouth or neck of the bottle. Close above the button or disk is secured to the stem, A, a smaller rigid ring or disk, C. Between these two disks is placed and held fast a disk or diaphragm of India rubber, felt, leather, or cloth, D, or any yielding substance, which should be somewhat larger in its external diameter than the disk, B,—say generally of a diameter about as large again, and larger than the lower part of the interior of the neck of the bottle. To a stop or shoulder on the upper part of the stem, A, which is long enough to project above the mouth of the bottle or vessel when the valve is in contact with its seat, there is attached or applied a helical wire spring, E, which covers the stem, A, for some little distance, and which need only be stiff enough to hold up firmly the stem, A, and cause the rubber or other diaphragm, D, to fit closely against the inside neck of the bottle."

The specification then describes two ways of supporting the spring at its bottom. One is to enlarge the mouth or neck of the bottle from the bottom of the spring upward so as to form an edge or shoulder sufficient to support the spring. The other is not to enlarge the neck, but to clasp over the top

of the neck two or three metallic strips, which extend down within the neck as far as the spring is to reach, and have their bottoms turned over the lower coil of the spring and thus give it a sufficient support. The specification proceeds: "The stopper is placed in the bottle by simply inserting it in the neck and pressing the spring, E, until the rubber or flexible disk or diaphragm, D, has passed below the narrowest part or place, *a*, of the neck. As the ring or disk C is considerably smaller than the disk B, the flexible disk or diaphragm D will fold up and around C as the stem, A, is passed down through the neck, and the stopper will thus easily pass into the bottle. But, when once the stopper has been so placed in the bottle, as the disk B is of nearly the size of the opening in the neck, any effort of the spring, E, or of any kind, to draw or push up the standard, A, presses the flexible disk D between the bottle and the bottom, B, and effectually prevents its coming out; and the greater the pressure from within against the bottom of the stopper, the closer will the contact be of the parts B and D against the sides of the bottle. When it is desired to open the bottle to discharge its contents, a bent instrument, such as is shown in Fig. 2, or any one fitted to accomplish the same purpose, pressing down the stopper, may be made use of."

The first two claims of the patent are as follows: "*First*, a stopper which is inserted through the mouth of the bottle, or other vessel, and which, when inserted, is closed perfectly tight against a seat found within the bottle itself by pressure in an upward direction; *second*, a prolongation of such stopper by means of a central stem, rod, or other extension of the stopper in an outward direction, beyond the seat of the valve, for the purpose of affording facility for opening the stopper, or that of receiving the upward pressure of a spring, or other means of drawing the valve to its seat, substantially as herein specified."

The stopper and bottle used by the defendants is that shown in "Codd No. 2." It is not proved that they used any other. In the defendants' arrangement, the stopper is a sphere of glass in a receptacle at the base of the neck of the bottle,

which receptacle communicates with the body of the bottle below, by an orifice which is too small to allow the sphere to pass down. The mouth of the bottle above the sphere is too small to allow the sphere to pass out above. The sphere is loose, and there is no spring. In the inside of the mouth is an annular groove, in which a ring of India rubber is inserted, with which the sphere, when it is to act as a stopper, comes in contact, and against which, as a seat, it is pressed to make a tight joint by the upward action of the gas in the liquid below. The receptacle referred to is of greater diameter than the neck above it, and of less diameter than the bottle below it. The bottle is opened by inserting the finger or some pushing instrument in the mouth, and pressing the sphere downward, causing it to leave its seat, and allowing the liquid to be poured out. The sphere, when the bottle is emptied, rests on the bottom of the receptacle referred to, over the orifice which leads into the body of the bottle.

It is alleged that the first and second claims of this patent are infringed by Codd No. 2. As the sphere in the bottle cannot pass out through the mouth, and as it is not inserted through the mouth of the finished bottle, it is put in before the bottle is finished. The bottle is made with the receptacle and the neck, and then the sphere is put in through the neck, and then a ring of melted glass is put on the outer end of the neck to form the finished mouth. The first claim of the re-issue does not contain the words "substantially as specified," but it must be construed as if those words were in it. Every claim of a patent has reference to the descriptive part of the specification. In the plaintiff's bottle, the stopper can pass in through the smallest part of the mouth of the finished bottle. This is dwelt on in the specification as "an important feature of the invention," and is made an integral part of the first claim. This feature does not exist in Codd No. 2. The stopper in that cannot pass in through the mouth of the finished bottle. The first claim is not a claim to any mechanism; but, if not a claim to a function, is a claim to a mode of operation. It amounts to a claim to inserting a stopper through the mouth of a bottle, and then pressing it upwards

till it is closed tight against a seat inside. It seems to be intended to cover every form of stopper and any form of mouth, and any means of pressure, and any arrangement of seat. As a claim thus broad it cannot be sustained. It must be limited to the mechanism described, having the mode of operation described. The stopper, to infringe, must be inserted through the mouth of the finished bottle substantially as the plaintiff's is, and the pressure upward must be made by mechanism and not by the gas in the liquid. The first claim is not infringed by Codd No. 2.

As to the second claim the specification says: "I am aware that an internal flap, valve, or door, acted upon by a spring float or counterweight, has been used to close the orifice of vessels, as an ink-holder or oil vessel, to keep out dust, etc., but intended to give way on a very slight pressure. Such arrangement, however, could not make a stopper which would "be air-tight." This statement shows that it was not new to press from without an internal valve closing the orifice of a vessel, such closing taking place by the action of a spring, and such pressure being made against the outer face of the valve to open the orifice. This being so, the second claim of the re-issue must be limited to substantially such a form of stopper as the specification shows, with substantially such a prolongation or extension in an outward direction, if, indeed, the claim can be made at all, in respect to the facility afforded for opening the stopper, in view of the admitted prior arrangement. Under this construction of the second claim it is not infringed by Codd No. 2.

The second patent sued on is No. 44,684, granted October 11, 1864, to J. N. McIntire, on the invention of Albert Albertson, for an improved method of stopping bottles. The specification says:

"Previous to my invention several methods of stopping bottles have been suggested and patented, all having for a main object to dispense with the employment of ordinary corks, (which have to be renewed at each filling of the bottles, and are expensive,) and avoid the labor involved in the use of them, especially in bottling gaseous liquids, where the cork

has to be tied or otherwise secured in the mouth of the bottle. Among the inventions suggested heretofore, having for their object the great *desideratum* of dispensing with the expensive and laborious system of corks and fastenings, the best method to my knowledge is that shown and described in letters patent granted to me on the twenty-sixth day of August, 1862. But experience and thorough practical tests have shown that in the method patented to me there are serious objections when put into general use; as, for instance, the liability of the mechanism to clog up, the necessity of an instrument for the purpose of readily opening the mouth of the bottle to empty it of its contents, and the liability of the necks of the bottles, from their necessarily weak form, to break during transportation or handling. These objections, and others, I propose to effectually overcome by my present invention, which has for a further object to produce a more economical, durable, and desirable method of stopping bottles than any heretofore known; and to these ends my invention consists in the employment of a stopper which may be inserted through the neck of the bottle, and so constructed that it can be brought into close contact with a suitable bearing surface or seat on the interior or neck of the bottle to close it, and be depressed or pushed down into the bottle to open it, as will be hereinafter more fully explained. And my invention consists further in so constructing the stopper and forming the seat or bearing surface in the neck of the bottle, that, while the stopper may be readily forced into the bottle, any tendency to force it out will only tighten the joint between the stopper and the seat in the bottle neck, as will be presently more fully explained. And my invention further consists in making the entire stopper of a length exceeding the diameter of the bottle in which it is to be used, so that the stopper, while resting in the body of the bottle, cannot turn round, but must always present itself right end foremost to the mouth of the bottle, as will be more fully described hereinafter. * * *

"Figure 1 is a vertical or longitudinal section of a bottle, with the stopper represented in the position in which it closes or stops the mouth of the bottle. Figure 2 is an elevation

of the same, (with the lower portion of the bottle broken out,) showing the position of the stopper after opening or unstoppering the bottle to empty it. * * A is the bottle, (of any shape or design,) on the interior of the neck of which I propose to form a shoulder, as seen at *x*. The stopper is formed of a stem or rod, *b*, having a suitable knob portion, *B*, and having secured (or formed) on it a gutta percha or other elastic or yielding valve or cork, *c*. I have represented the stem, *b*, as made of metal, and with a thimble or cover, *e*, of soft material, such as gutta percha, at its lower end, the object of which is to avoid any possibility of injuring the bottle by the sudden contact with the glass of the hard stem, when the latter is forced or drops down into the bottle in 'opening.' The valve portion, *c*, I have shown secured to the stem, *b*, by means of a band or collar, *d*, and an annular depression in the stem, *b*, into which the yielding stock of *c* is forced and held by the encircling collar, *d*; but, in lieu of this mode of construction, the entire stopper may be formed, if found practicable and expedient, of rubber; the stem portion 'hard,' with its lower end 'soft,' and the conical valve portion, *c*, of the proper flexibility. The position of the valve portion, *c*, on the stem, *b*, is such as to allow the knob or upper end of the stopper to protrude a short distance beyond the mouth of the bottle when the valve, *c*, is in its seat—that is, when the bottle is closed—in order that the stopper may be readily forced down into the bottle by pressure or a blow with the hand, to open the bottle. The entire length of the stopper (its stem) is such that, when resting in the empty bottle, as shown at figure 2, it cannot turn over and get wrong end towards the mouth of the bottle. At figure 2 I have shown in dotted lines the position of the projecting end of the stopper before the bottle is unclosed. I prefer to make the valve, *c*, as shown, conical, with upper end hollow, and provide the interior of the neck with a shoulder, *x*; for in this form of valve and seat the stopper is readily forced down through the neck, but, in being forced up against its seat or shoulder, the valve, *c*, will be bulged or upset, and cannot be forced out, which is a *desideratum* where the contents of the

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bottle embrace gas or fixed air,—as, for instance, when soda water is contained,—but other forms of valve may be used without destroying the advantages of my invention. The valve, *c*, and neck of the bottle should, however, be so shaped, even when the shoulder, *x*, is employed, that the former will be compressed in the taper portion of the neck before it comes against the shoulder, in order to create friction sufficient to prevent the falling of the stopper when still liquors are contained in the bottle; as, for instance, a valve slightly conical on the upper end, and fitting into the neck of the bottle, shaped correspondingly, and without any shoulder. The operation of my new stopper for bottles, etc., may be thus explained:

“I may remark first, however, that the manipulation, in closing a bottle with my invention, is different somewhat when different liquors are to be bottled; that is, those which are bottled under pressure, such as soda-water, and those which are still liquors, or without gas or pressure. In all instances, however, the stopper is formed as shown, and is forced into the bottle as seen at figure 2. To bottle soda-water and other gaseous liquids, under pressure, I take the bottle, thus provided with its stopper, and place it in the filling machine, in which the given quantity of water and gas is supplied to the bottle, the stopper remaining, as seen at figure 2. I then invert the bottle while it is yet attached to the supply tube, which must for this purpose be flexible and have its cock arranged so as to admit of the bottle, while attached to the tube, being thus turned over, when the stopper falls into the neck of the bottle, the valve, *c*, resting in its seat, and in this position I disconnect the bottle from the filling machine, when the pressure within the bottle retains the valve, *c*, against its seat and keeps the bottle effectually closed. When it is desired to empty the bottle a slight blow or pressure on top of the knob, *b*, will cause the stopper to descend to the bottom of the bottle, as seen at figure 2, and the liquid is poured out. The stopper being of a much greater specific gravity than the liquid, and being so long, will not impede the flow of the liquid from the bottle if it is gradually poured

out. In bottling still liquids, such as cider, porter, etc., which make more or less gas after being closed up, I take the bottle provided with its stopper, as before mentioned, and pour in the liquor in the usual manner; then, quickly inverting the bottle, cause the valve, *c*, to drop into its seat partially, and, taking hold of the protruding end or knob, *b*, I pull the valve, *c*, tight into its seat, when the mouth of the bottle will be effectually closed, and the compression of the valve, *c*, of elastic material, in the tapering portion of the neck, will insure the retention of the stopper; then the bottle is turned up again. The mode of unclosing is the same in all cases. * * *

"Wishing to be understood as not limiting my claims of invention to any particular materials or precise forms of the parts so long as they embody the characteristic features of form, and the mode of operation involved in my invention, what I claim as new and desire to secure by letters patent is—*Firstly*, the employment in combination with a bottle, having the interior of its neck suitably formed to receive it, of a stopper constructed to operate in closing and unclosing the bottle, substantially as described; *secondly*, I claim so constructing the valve, *c*, and the mouth of the bottle, that the former may be readily forced through the latter in one direction, and incapable of easy passage through it in the opposite direction, as herein before described, for the purpose set forth; *thirdly*, I claim making the entire stopper of such a length that it cannot turn over in the body of the bottle, as and for the purpose set forth."

It is important to see what is the proper construction of the first claim of this patent. The specification describes the stopper as having a valve on it which is to be elastic or yielding. It is indispensable that this valve shall be compressible. The stopper with the valve on it is described as a distinct thing from the bearing surface or seat on the interior of the neck of the bottle with which the valve comes in contact to close the bottle.

By the terms of the first claim the stopper is to be "constructed to operate in closing and unclosing the bottle substantially as

described." The claim is to mechanism, to a physical structure, to the combination of a bottle which has a neck, and has the interior of its neck suitably formed to receive the stopper, with a stopper constructed as stated in the claim. This means a stopper constructed as described, and which, by reason of its construction, operates as described, in connection with the neck of the bottle, in closing and unclosing the bottle. The claim is not to the employment in a bottle of a given mode of operation, resulting from any structure of stopper. Such a claim would not be a claim to a process; it would be a claim to a function of mechanism aside from the structure of such mechanism. It would not be a valid claim. The proper construction of the claim is that it is a claim to the employment, in combination with a bottle having the interior of its neck suitably formed to receive such stopper, of a stopper constructed substantially as described. Of course, a stopper constructed as described will, in combination with a bottle so arranged, operate in a definite way,—in the way described in closing and unclosing the bottle. The claim, then, is, in effect, one to the structure of the stopper, so far as its parts are brought into use in the closing and unclosing of the bottle.

In Codd No. 2 the stopper is a stopper of a different structure from the plaintiff's stopper, and it does not have the features of construction or operation which the specification of No. 44,684 states to be, or which are, the characteristic features of the plaintiff's stopper, so far as those features are not also characteristic of the stopper shown in the Albertson patent of August 26, 1862. In Codd No. 2 the stopper cannot be inserted through the neck of the bottle, and is not of a length exceeding the diameter of the bottle, or receptacle in which it is placed; although it can be brought in close contact with a suitable bearing surface or seat on the interior of the neck of the bottle to close it, and be depressed or pushed down into the bottle to open it, and although any tendency to force it out only tightens the joint between the stopper and the seat. These features all of them existed in the patent of August 26, 1862, in reference to the stopper there

shown. The stopper in Codd No. 2 has no stem or rod, no knob projecting beyond the mouth of the bottle when the sphere is at its closing place, no elastic yielding or compressible valve on the stopper. It is true that the stopper in Codd No. 2 is of a greater specific gravity than the liquid, so that it will fall into the seat by gravity when the bottle is inverted, and then be held there by the pressure of gas in the liquid. But this is not enough to make an infringement of the first claim. The construction of the stopper in Codd No. 2 is so essentially different in the particulars above pointed out from that of the plaintiff's stopper, so far as such construction is involved in the first claim, that it cannot be held to infringe that claim. The second claim is not infringed because in Codd No. 2 there is no valve, C, on the stem, and no valve capable of being forced through the mouth of the bottle from without it. The third claim is not in question.

The bill is dismissed, with costs.

PETERSON v. THE CHANDOS AND MASTER.

(District Court, D. Oregon. November 9, 1880.)

1. CRANE LINE.—The primary purpose of a crane line is to steady the backstays, and in blustery weather it is very apt to chafe and wear out where it is fastened to the stays; and, therefore, it ought not to be used as a foot-rope without caution, and the aid of the stays.
2. SAME.—The weather being wet and the night dark, and the wind strong, the libellant was ordered to go aloft and cast off the stop on the foretop-gallant halliards, which he did by going up the rigging and out on the crane line to the space between the topmast and top-gallant stay, and there untying the stop with both hands while he sat upon the crane line, without any other hold or security, and, just as the stop was cast off, the line parted near the top-gallant stay, and the libellant was precipitated to the deck and seriously injured.

Held, that the injury was caused by the negligence of the libellant in going on the crane line without an opportunity of examining its condition, and without holding to the stays by his arms or legs, or both, while casting off the stop; and that if, by reason of the negligence or misconduct of the mate, the crane line was insufficient, still the libellant could not recover damages for the injury, because even then his own negligence substantially contributed to the result.

3. **FELLOW SERVANT.**—*Seem* that the mate is not the fellow servant of a sailor so as to exempt the master from liability for an injury caused to the latter by the negligence of the former.
4. **DEVIATION.**—A departure from the due course of a voyage to save property merely, is a deviation, and will forfeit the insurance; but a departure to save life is not. But, although the law will, as between the insurer and insured, excuse a departure from motives of humanity, a master is not correspondingly bound to make such departure even to save the life of one of the crew; but the time and risk likely to be consumed and incurred in such departure, as compared with that incident to the direct voyage, are to be considered, and have a controlling influence in the matter.
5. **SAME.**—On June 10th, in latitude 38 south, and longitude 91 west, the ship *Chandos* was on her way to Portland, Oregon, with a cargo of railway iron, without a surgeon or any surgical appliances on board, when the libellant fell from aloft and broke his thigh bone. *Held*, that if the ship could have made a port—as, for instance, Valparaiso, distant about 1,080 miles—in five or six days, it would have been the duty of the master to have gone there, and obtained surgical aid for the libellant; but if it could not have been done in less than two weeks, he was not bound to make the departure.
6. **SICK OR INJURED SEAMEN.**—The hospital service of the United States is not intended to supersede the marine law, which imposes an obligation on a vessel to take care of a seaman falling sick, or becoming injured in its services, but only auxiliary thereto.
7. **SAME.**—A seaman injured in the service of a vessel, without his fault, is entitled to be taken care of at the expense of the vessel until the end of the voyage, and longer, if necessary to effect a cure, so far as the same can be done by the use of the ordinary medical means; and the fault which will exempt a vessel from such liability is not mere ordinary negligence consistent with good faith, but some positively vicious conduct, such as gross negligence, or wilful disobedience of orders.
8. **NEGLECT TO SEND SEAMAN TO HOSPITAL.**—Damages allowed for neglecting to send libellant to the marine hospital at Portland, at the expense of the ship, for 12 days after her arrival in the Columbia river.

In Admiralty.

John Woodward and Charles Woodward, for libellant.

John W. Whalley and M. W. Feckheimer, for respondent and claimants.

DEADY, D. J. In January, 1880, the American ship *Chandos* sailed from the port of New York for Portland, with a full cargo of railway iron. The libellant, Gustavus Peterson, a

native of Sweden and aged twenty-seven years, shipped for the voyage as an able-bodied seaman.

Near three o'clock of the morning of June 10th, in about latitude 38 south, longitude 90 west, from Greenwich, the weather being dark and rainy, with a good breeze, the libellant was ordered by the second mate to go aloft and cast off the stop on the foretop-gallant halliards. He went up the rigging on the starboard side to the top, and thence out on the crane line, and stood or sat upon it—probably the latter—between the topmast and top-gallant backstays, while, without other hold or support, he untied with both hands the stop, which was about 18 inches or two feet above the line. Just as the libellant finished untying the stop, the line on which he was resting parted at the hitch near the top-gallant stay and precipitated him to the deck. In falling, he appears to have struck first on one foot on the ship's boat, which was stowed bottom up on the booms just abaft of the foremast, and then fell over on the deck, striking his head on the pin-rail as he went down. The distance from the crane line to the bottom of the boat on which libellant struck is about 30 feet, and from there to the deck is about 10 feet more.

The alarm was soon given and the man was immediately carried into the house on deck, used as a forecastle, in an unconscious condition, and bleeding profusely from what appeared to be a severe injury to the head. The master was called and came at once to the forecastle, and had the libellant stripped and examined, placed in a bunk, and dressed his head. The fall caused a fracture of the collar bone, and a severe cut in the head, from which the libellant in due time fully recovered. It also caused a fracture of the *femur* or thigh-bone of the right leg a little below the middle of the same. On the next day after the accident the master had the libellant removed into the carpenter's room, and his leg bandaged with splints and placed in a box then made for that purpose. There seems to have been a difference of opinion on board as to whether the leg was broken or not—the master's testimony being that he did not think that it was broken until July 4th, when the vessel was in latitude about 2 degrees north and

longitude 110 west, at which time he became satisfied that it was broken.

The Chandos arrived in the Columbia river on August 10th, and anchored in Baker's bay, where she remained 10 days, and then proceeded to Portland, where she arrived on August 22d. There the libellant was sent to the marine hospital, where he remained about two months. From the evidence of the hospital physicians the bone has united and the leg will in all probability be strong and sound, but it is about three inches short; the knee is also somewhat stiff, but that will probably pass away.

The libellant brings this suit against the vessel and the master to recover \$5,000 damages for the injury suffered by the fall, and the subsequent inattention, alleging that the fall was caused by the neglect of the master in not providing a sufficient crane line, and that the shortening of his leg was caused by neglect and the want of proper treatment after the fracture.

Upon the first point I find against the libellant. From the evidence it plainly appears that the crane line is not primarily a foot-rope, and that it is put upon the stays to keep them steady, and not to walk upon, but that it is often used by seamen more or less as a support or rest in going from the top to the stop and casting it off. It also appears that this line, which is usually on this vessel a fifteen-thread ratline, is very liable to chafe and wear from the swaying of the stays, so that sometimes it only lasts a day or so, and is therefore considered an insecure footing, and one that ought not to be used without other support, or more than ordinary caution.

As an evidence of how soon this line may become chafed and weakened, and therefore of its insecurity as a foot-rope, it may be mentioned that on the evening before the libellant was hurt, as he came down from furling the sail, he sat with all his weight upon this same crane line while he put on this same stop. And yet it broke with him under similar circumstances within eight hours thereafter. When, therefore, the libellant, who appears to be a man above the average weight, went upon this line in the dark, without any precaution against

its breaking, or observation as to its then condition, I think he was guilty of negligence. The libellant assumed the ordinary risks of his employment, and the liability of the crane line to part appears to be one of them.

The negligence of the libellant was the proximate, if not the sole, cause of the injury; and, therefore, he cannot recover for the damage resulting from it. 2 Thompson on Negligence, 1148; *Bowas v. Pioneer Tow Line*.

But the libellant also claims that the crane line was insufficient when put up, a few days before, by the express direction of the mate, being only a piece of old rotten manilla gasket; that he went upon the crane line to cast off the stop by the special order of the second mate, and that it was customary on the vessel, in giving an order to cast off this stop, to say: "Go aloft, and get on that crane line and cast off the stop on the top-gallant halliards." But, in my judgment, the evidence fails to establish either of these allegations; and, if it did, the libellant would not thereby be relieved from the obligation to exercise ordinary care and prudence in going on such line, or casting off such stop.

Admitting however, the alleged negligence of the mate, and that the master or owner and the vessel are liable therefor, still, if the negligence of the libellant substantially contributed to produce the injury, he could not recover damage therefor. In this view of the matter it is unnecessary to consider whether the mate was a fellow servant of the libellant, within the general rule which exempts a master from responsibility for injuries to those in his employ resulting from the negligence of a fellow servant employed in the same general business.

In *Halverson v. Nison*, 3 Saw. 562, the libellant, while at work upon a triangle, fell to the deck, by reason of the negligence of the mate in rigging the same, and was seriously injured. Mr. Justice Hoffman, upon the strength of the authorities, but with apparent reluctance, held that the owners of the vessel were not responsible for the injury.

But the mate being the immediate agent and representative of the master,—his very right hand, as it were,—acting

within his view and under his personal direction, I think he ought not to be considered the fellow servant of the men in the forecastle within this rule, but rather the *locum tenens* of the master and owner, for whose negligence, resulting in injury to any of the crew while in the correct discharge of their duty, the vessel and master ought to be responsible.

The relation between the master and sailor at sea is more of a parental character than that between the employer and employe on shore,—particularly in the great transportation lines, workshops, and factories of modern times; and, therefore, the former may and do rely more for their safety and well-being upon the foresight and personal direction of those in authority over them than the latter. Again, an employe on shore, who is unwilling to incur the risk arising from the negligence or want of skill of a fellow servant, may ordinarily quit such employment, but a seaman must remain on board, at least until a port is made, however unskilful or negligent the mate may be.

In the argument for the respondent and claimants significance was sought to be given to the fact the libellant went aloft in his oil skins and gum boots, and by way of the rigging, instead of "shinning up the backstays." But in this instance it is too plain for argument that the libellant's fall was not in any way attributable to the amount of clothing he wore, or the way in which he went aloft, but solely to the means he adopted of supporting himself while there—the resting his whole weight upon the crane line without being aware of its condition. From the evidence, and the very nature of the case, I am satisfied that it was just as proper, and much easier and safer, to have climbed up the rigging and have swung out on the backstays, to cast off this stop, as to have shinned up the stays for that purpose. Under ordinary circumstances an active, light man might adopt the latter way, while a heavy, logy one, particularly at night in rough weather, would very naturally prefer the former.

The second point made by the libellant is not so easily disposed of. It is the well-settled law that a seaman receiving an injury, or becoming sick in the service of the ship

without his fault, is entitled to be cured or cared for at the expense of the vessel. *Harden v. Gorden*, 2 Mass. 547; *Reed v. Canfield*, 1 Sum. 197; *The Ben Flint*, 1 Abb. U. S. R. 128; *Brown v. Overton*, Sprag. Dec. 462. And the fault which will forfeit this right upon the part of the seaman must be some positively vicious conduct, such as gross negligence or wilful disobedience of orders. Ordinary negligence, consistent with good faith and an honest intention to do his duty, is not sufficient. *Reed v. Canfield*, *supra*, 206; *The Ben Flint*, *supra*, 130. The propriety and good policy of this rule is eloquently vindicated by Mr. Justice Story in *Harden v. Gorden*, *supra*, 547, and in the application of it a court of admiralty will not be quick to find cause to exclude the seaman from its benefits.

The libellant, notwithstanding his want of caution in going upon the crane line, was clearly entitled to be cared for at the expense of the ship, and the question now is, what was the nature and extent of this obligation? It is not contended by counsel for the libellant that the ship ought to have been furnished with a surgeon, or that the master should have had more than ordinary knowledge and experience in ascertaining or treating fractures of the leg. But it is claimed that if the master had exercised ordinary skill and care in the examination and treatment of the libellant's leg, he would have ascertained that the thigh-bone was fractured, and have been able to set it so that it would not now be three inches short; and also that it was the duty of the master under the circumstances to have gone into the nearest port—Valparaiso—where it is admitted that proper surgical aid and appliances could have been obtained. Upon the evidence it is very uncertain what time it would have taken to reach Valparaiso from the place where the accident occurred—a distance of 18 degrees east and 5 degrees north. Counsel for the libellant argues that it might have been done in 11 days, but the calculation upon which this conclusion is based assumes that the vessel might have changed her course from about north-west to east, and made about four miles an hour to Valparaiso.

Now, there is no evidence in the case as to the force or direction of the wind between the locality of the accident and

the latter place, and we are, therefore, left almost to conjecture as to the time that would have been consumed in making the detour. The burden of proof is upon the libellant to support his allegation that the master failed to do his duty towards him in this respect. If it had been shown that the vessel could, under the circumstances, make about ten miles an hour, and thereby have made Valparaiso in a little more than five or six days, it might have been proper for the master to have gone in there—indeed, I think it would have been his duty to do so. But, as it is, I do not think it would be safe to assume that this port could have been made in less than two weeks, and I do not think that the vessel was under obligation to make that sacrifice of time and risk of cargo for the libellant.

In *Brown v. Overton*, *supra*, the libellant fell from aloft and broke both his legs below the knees. The master set them as well as he could, and they were permanently deformed and disabled. The accident happened 25 days' sail from St. Helena, and the course of the vessel was within eight or ten hours of that port, but the master refused to touch there for surgical aid. Mr. Justice Sprague held that it was the duty of the master to have gone in, although it is doubtful whether the deformity could have been prevented or cured at that late day. No other case at all in point has been cited on this question; and, while it proves it is the duty of the master to seek surgical aid for a wounded seaman while there is any chance of its being useful, yet it by no means follows that it is his duty to do so at any sacrifice or risk to the vessel or voyage. There must be some limit to the obligation to seek aid outside of the vessel. A fall from aloft is an incident of a seafaring life, and the law can scarcely be that in such a case surgical aid must be sought to the serious hindrance or delay of the voyage and the liability of the cargo to depreciation in the port of destination, or the delay or loss to some important enterprise undertaken upon the faith of its due delivery.

It is also urged by counsel for the respondent that, under the circumstances, any departure from the prescribed course of the voyage to obtain aid for the libellant would have been

a deviation, and caused a forfeiture of the insurance upon the vessel and cargo. The rule of law is that a delay by departure from the due course of a voyage, to save property merely, is a deviation, but to save life is not. *Crocker v. Jackson*, Sprague's Dec. 142; *The Boston & Cargo*, 1 Sum. 335; *The Ewbank & Cargo*, Id. 424; *Bond v. The Cora*, 2 Wash. 84.

Whether a departure in such a case as this can be considered as made to save life may be a question. As between the insured and insurer, if there is any doubt about it, it should be resolved in favor of the former. I have found no case exactly in point, and in the meantime will say, with Mr. Justice Washington, in *Bond v. The Cora*, *supra*, that "I will not be the first judge to exclude such a case from the exceptions to the rule," that a deviation works a forfeiture of the insurance. But the law, in the interest of humanity, will, as between the insurer and insured, justify a departure from the course of the voyage to save life in cases where the vessel is under no legal obligation to do so; and, therefore, even if the Chandos might have gone to Valparaiso to save the life or limb of the libellant without forfeiting her insurance, it does not follow that the master was bound to make such departure. For the like reasons and stronger, which excused the master from going into Valparaiso, he was not bound to put into any port south of San Francisco; and when he reached the point—39 degrees 30 minutes north latitude, 140 degrees 20 minutes west longitude—from which it was convenient to make the latter port, he was quite as near the mouth of the Columbia as the Golden Gate, and was therefore justifiable in preferring the former, as it was on the course of his voyage.

As to the treatment of the libellant on board the Chandos, it does not appear that there is any just ground of complaint, unless it be that the master ought to have ascertained that his leg was broken before he did, and at once. His own testimony is to the effect that he did not conclude the leg was broken until July 4th, and that is the entry in his log. But of the truth of this I am in doubt, because it appears that he treated the limb as if it was broken, as far as the appliances

within his command would permit. He had the leg bandaged with splints, and put in a box the next day after the accident. His present explanation of why he used the box is that it was to keep the leg from "slatting" (rolling) around with the motion of the ship; and that very circumstance, it seems to me, ought to have led to an examination that would have disclosed the fact that the *femur* was fractured. Still, it does not appear that the master, with the means at his command, could have cared for the leg any better than he did, even if he had been certain that it was fractured. From the evidence it appears that the fracture was caused by the fall from the crane line to the boat and striking on the foot, and therefore it was probably oblique, and attended with more or less displacement—the upper part of the bone turning upwards, and the lower part pushing downwards and backwards and by the other. 2 Holmes' Sys. Surg. 861.

In such a case, it appears from the books that if the subject is an adult, whose muscles are not paralyzed, and therefore offer the ordinary resistance to extension, more or less shortening—from one-fourth to one and one-half inches—will always be the result, even where the case is treated by skilful surgeons, with the best appliances; nor will a shortening in such case of even three inches necessarily imply unskilful treatment. Hamilton's Prin. & Prac. Surg. 291; Id. Frac. & Dislo. 397; 2 Holmes' Surg. 865; 1 Elwell's Med. Sur. 97.

It only remains to consider the case after the arrival of the *Chandos* in the Columbia river. And, first, it is well to state that the obligation of the ship to take care of the libellant, and do what could be done for him under the circumstances, continued until the vessel arrived at Portland—the end of his voyage—and even longer, if the libellant still required nursing or medical treatment; and the fact that the libellant was entitled to admission into the marine hospital at Portland, did not excuse the ship from this obligation, because that was his personal privilege or right, which he might avail himself of or not, as he saw proper. As was said by Mr. Justice Strong, in *Reed v. Canfield*, *supra*, 200, 202, the hospital serv-

ice in the ports of the United States does not supersede the marine law on this subject, but is only auxiliary to it; and, notwithstanding this, the seaman is entitled "to be cured, at the expense of the ship, of the sickness or injury sustained in the ship's service. * * * The expenses incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, are a charge on and to be borne by the ship; * * * and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from any further liability."

When the Chandos arrived at Baker's bay, according to the testimony of the experts, there was still a chance that the leg might be reset so as not to be more than one and a half inches short. At least, the libellant was still on his back from the effects of the injury, with a leg which was manifestly three inches short. Under the circumstances it was the bounden duty of the master to have procured surgical aid and advice at once, and see if anything could be done to give the unfortunate man the use of his limb. This aid could have been obtained from Fort Canby, which was almost within hail, or Astoria, only a few miles distant, or by sending the libellant to Portland.

But the master left the vessel at once, and after reporting the case to the collector at Astoria, who it seems advised that the libellant be kept on board until the vessel reached Portland, washed his hands of the matter and proceeded to the latter place on business, without even making arrangements for a surgeon to visit the libellant on board the vessel. Upon his return to the vessel on August 14th, four days afterwards, he informed the libellant what the collector said, and added that the libellant was now in the hands of the collector, and that he, the master, had nothing to say, but advised him to remain where he was, as it would cost him \$40 to go to Portland, besides the risk of moving from boat to boat.

When the vessel came to Astoria, on August 20th, the master, instead of calling a surgeon then to see the libellant, at the expense of the vessel, wrangled with the collector about

employing one until the latter sent a physician on board, who simply advised that as the vessel was going directly to Portland, where there was a marine hospital, that the examination of his case be deferred until he reached there. In all this conduct of the master there appears to have been a manifest neglect of duty, and purpose to shirk the expense of giving the libellant the attention he was entitled to. The libellant was not in the hands of the collector, unless he had actually been delivered into his charge as the agent of the marine hospital service, of which there is no pretence; nor was the expense of transporting the libellant to the hospital at Portland, in advance of the vessel, a proper charge against him under any circumstances, but it should have been paid by the vessel, unless the transportation was furnished by the hospital service.

In this matter I fear the master was actuated by a desire to save expense to the vessel, of which it appears from the answer he is a part owner. In a spirit of petty parsimony he appears to have denied the libellant a chance to have his fractured leg reset and made comparatively useful, rather than incur the trifling expense of sending him from Baker's bay to the hospital at Portland. For this dereliction of duty the master and the vessel are responsible to the libellant in damages. The amount of these, of course, must be limited by the uncertainty as to whether an immediate removal to the hospital would have been of any substantial benefit to the libellant.

In *Brown v. Overton*, *supra*, which is, in many of its circumstances, a similar case to this, the master neglected to send the libellant, who had fallen from aloft and broken both his legs 70 days before, to a hospital for three or four days after the vessel arrived at the port of Boston, and damages were allowed for such neglect, as well as the refusal to put into St. Helena for surgical aid 25 days after the accident occurred, amounting to \$600. In fixing the amount of damages in this case the court will not overlook the fact that the general treatment of the libellant by the master has been kind

and considerate, nor that the principal and only fault in his conduct seems to have arisen from a desire to save for the ship at the expense of the libellant. Under the circumstances I think the libellant ought to recover at least \$250, and a decree will be given against the ship and master accordingly.

THE TRENTON.

(District Court, E. D. Michigan. November 29, 1880.)

1. ADMIRALTY—SALE—LIENS.—By the law of most, if not all, civilized nations, the sale of a vessel by proceedings *in rem*, in a court of competent jurisdiction, extinguishes all liens upon her, and vests a clear and indefeasible title in the purchaser.
2. SAME—SAME—SAME.—Hence, where an American vessel was sold by the maritime court of Ontario, the sale was held to discharge a lien for necessities furnished in Cleveland, Ohio, notwithstanding the court had declined to enforce such lien against the vessel for the want of jurisdiction.
3. SAME—SAME—SAME.—In such cases the lienholder is remitted to his remedy against the proceeds of sale, and it seems that his claim will be allowed wherever a lien exists by the law of the place where the contract is made.

In Admiralty.

This was a libel for supplies and materials furnished at Cleveland, the home port of the vessel, in 1876, for which a lien was claimed under the law of the state of Ohio. The present owner of the schooner, appearing as claimant, pleaded in substance that in July, 1878, the libellants caused the vessel to be seized at Toronto, Ontario, by virtue of a warrant issued by the maritime court of Ontario, upon a petition filed by the libellants for the same cause of action for which their libel was filed in this court; that in August, 1878, one Michael Gallagher intervened with a claim for wages as watchman and ship-keeper from December 1, 1877, to June 27, 1878; that about the same time one William McAllister also intervened with a claim for wages as mate from April 4 v.4,no.7—42

to May 4, 1877, to the amount of \$52.50; that the two last-mentioned claims were consolidated, and on September 25, 1878, the vessel was condemned and ordered sold to satisfy these claims; that upon such sale she was purchased by the claimant for \$1,000, and she has since been registered at the custom-house in Toronto; that notice of the pendency of these proceedings, and of the sale, was given by publication, pursuant to the practice of the court, and by the arrest and detention of the vessel; that the maritime court of Ontario had jurisdiction of these causes and authority to direct the sale, and that claimant became the owner of the vessel, discharged of all liens.

It appeared, from the proceedings in the Canadian case, that a demurrer was interposed to libellants' petition, upon the ground that the maritime court had no jurisdiction to enforce a claim for necessities supplied to an American vessel in a port in the United States. This demurrer was sustained by the court, and libellants' petition dismissed. The vessel was sold, as above stated, by virtue of a decree rendered upon the consolidated claims of Gallagher and McAllister. The question in this case was whether this sale was sufficient to divest the libellants of their claim for necessities.

Moore & Canfield, for libellants.

Wisner & Speed, for claimant.

BROWN, D. J. The maritime court of Ontario was created by an act of parliament of the dominion of Canada, approved April 28, 1877, the object of which was "to establish a court of maritime jurisdiction in the province of Ontario." The first section vested in the court, in very brief language, "such jurisdiction as is exercised by any existing British vice-admiralty court." To ascertain what jurisdiction is exercised by the vice-admiralty courts of Great Britain, we are referred to an act of the imperial parliament known as "the vice-admiralty court's act, 1863," which is made applicable to all existing as well as to future vice-admiralty courts. The tenth section of this act declares that these courts shall have cognizance

of what are generally known as maritime cases, viz.: Seamen's and master's wages, pilotage, salvage, towage, damage, bottomry bonds, payments of mortgages from the proceeds of sale, possessory suits, and, among others, (subdivision 10,) "claims for necessities supplied in the possession in which the court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessities being supplied."

In considering the effect of this sale, I must assume that the dominion parliament had the requisite authority to establish this court, and that it possesses the powers and jurisdiction which the act purports to vest in it. While not strictly a vice-admiralty court, (the judges of which hold their commissions directly from the crown,) its jurisdiction is nearly if not quite identical with those courts, and we are bound to give its proceedings such faith and credit as is given to them.

That the sale of a vessel, made pursuant to the decree of a foreign court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. Story on Conflict of Laws, § 592; *Williams v. Armroyd*, 7 Cr. 423; *The Tremont*, 1 W. Rob. 163; *The Mary*, 9 Cr. 126; *The Amelie*, 6 Wall. 18; *The Granite State*, 1 Sprague, 277. In the case of *The Helena*, 4 Rob. Adm. 4, this doctrine was carried so far as to sustain a sale made after a capture by pirates. See, also, *Grant v. McLaughlin*, 4 John. 34.

These cases fully establish the doctrine stated by Mr. Justice Story, (Conflict of Laws, § 592,) that "whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature over which courts have a rightful jurisdiction, founded upon the actual, rightful, or

constructive possession of the subject-matter." This is not the law of England and America alone. The commercial code of France contains similar provisions regarding the judicial sale of ships.

Article 193: "The liens of creditors shall be extinguished, independently of the general methods of extinguishing obligations, by a judicial sale made according to the forms established by the following title, or when, after a voluntary sale, the ship shall have made a voyage at sea under the name and at the risk of the purchaser, and without opposition on the part of the creditors of the vendor."

In commenting upon this article, Dufour observes, (2 Droit Maritime, 47:) "Moreover, the sale upon seizure has always had the effect, in our law, of purging the encumbrances with which the property was charged." "The decree clears all liens," said Loysel. "We perceive the reason of this. These kinds of sales are made notoriously and publicly. The creditors are perfectly advised of what is passing. It is for them to take precautions to assure their payment from the price of the ship; but if they persist in remaining unknown their negligence ought not to prejudice the purchaser. To these general reasons we ought to add another peculiar to the maritime law. He who buys at a judicial sale must pay his price upon the spot. He is not bound to wait until the creditors are made known to pay into their hands. He ought, then, to be protected against their claims. Otherwise the judicial sale, instead of offering security which attracts buyers, would be only a snare from which they would eagerly escape. For these reasons, according to our article, the purchaser at a judicial sale receives the vessel free and clear of all encumbrances." Page 53. "Moreover, it would not follow that the creditors are entirely disarmed by this result. On the one hand their debt, in effect, subsists; and, on the other, nothing is easier than to transfer the entire amount, with the lien which it draws after it, to the price of the ship."

Article 766 of the German Mercantile Code expressly provides that the lien of ships' creditors upon the vessel becomes

void: (1) "By a compulsory sale of the vessel in a home port the purchase money takes the place of the ship, as regards the ship's creditors. The ship's creditors must be publicly summoned to protect their rights. In other respects the provisions regulating the proceedings for a sale are reserved to the laws of the various countries." The 600th article of the Spanish Code is equally explicit: "If the sale takes place at public auction and with the intervention of judicial authority, according to the formulas prescribed by article 608, every responsibility of the ship in favor of its creditors is extinguished from the moment in which the written evidence of sale is agreed to." Similar provisions are found in article 1398 of the Portuguese, article 193 of the Belgian, article 290 of the Italian, article 840 of the Chilean, and article 477 of the Brazilian Code. In short, the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

Such sales, however, may be impeached by the owner or other person interested by showing (1) that the court or officer making the sale had no jurisdiction of the subject-matter by actual seizure and custody of the thing sold. *Rose v. Himely*, 4 Cranch, 241; *Bradstreet v. The Neptune Ins. Co.* 3 Sumn. 601; *The Mary*, 9 Cranch, 126; *Woodruff v. Taylor*, 20 Vt. 65; *Daily v. Doe*, 3 Fed. Rep. 903. Whether it be not also essential that there should have been proper judicial proceedings upon which to found the decree, and personal or public notice of the pendency of such proceedings, it is unnecessary here to determine, since it appears that sworn petitions were filed, and notice of the pendency of the proceedings given through the newspapers, pursuant to the practice of the maritime court. (2) That the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party. *Parkhurst v. Sumner*, 23 Vt. 538; *Annett v. Terry*, 35 N. Y. 256; *Castrique v. Imrie*, L. R. 4 H. of L. 427. (3) That the sale was contrary to natural justice. *The Flad Dyen*, 1 C. Rob. 135; *Castrique v. Imrie*. In case of sale by a master, the court will inquire into the circumstances and see whether

it was necessary and for the interest of all concerned; but the effect of such sale to discharge liens is the same. *The Amelie*, 6 Wall. 18.

In the case under consideration none of these objections are taken to the validity of the sale, but it is insisted that it cannot be held to have discharged the vessel of liens which the court making the sale had no jurisdiction to enforce. I have found no case, except possibly that of *The Angelique*, (17 Law Rep. 104, since expressly overruled,) which lends countenance to this proposition. Upon principle, it seems to me wholly untenable. It is true the vessel was originally condemned, in part at least, upon a claim for ship-keepers' fees, which would not in this country be considered to import a maritime lien. *The Thomas Scattergood*, Gilpin, 1; *The Havana*, 1 Sprague, 402; *The Island City*, 1 Low. 375; *The Sarah Jane*, 2 Am. Law Rev. 450; *Gurney v. Crockett*, Abb. Ad. 493. But this was a question exclusively for the consideration of the maritime court under the laws of Canada, and the presumption is conclusive that the facts necessary to give that court jurisdiction existed. *Hudson v. Guestier*, 6 Cr. 281; *Comstock v. Crawford*, 3 Wall. 396. To say that the judicial sale of a vessel frees her only from such liens as the court making the sale had jurisdiction to enforce by original process, is a practical denial of the principle that such a sale vests a clear title in the purchaser. This would make the validity of the sale depend, not upon the power of the court to condemn and sell, but upon its authority to assume jurisdiction of all claims which, by the law of another country, might be liens upon her. There are probably no two countries in which the jurisdiction of the admiralty courts is identically the same. That of our own courts does not extend to all cases which would fall within such jurisdiction according to the civil law, and the practices and usages of continental Europe. By the codes of most civilized nations the cost of construction, the wages of ship-keepers, the rent of warehouses for the storage of her tackle and apparel, money lent to the captain for the use of the vessel, are all ranked among privileged debts. In

England the court of admiralty is vested with jurisdiction, not only of ordinary collisions, but of damages done by a ship to wharves, breakwaters, and other fixtures annexed to the soil; while in this country it is limited to floating structures. In England a master has a remedy against the ship and freight for wages. In the United States he is confined to a proceeding *in personam*. By the law of continental Europe a lien arises for necessities furnished in a home port, while in this country there is none unless created by a state statute, and none in England if an owner is domiciled within the kingdom. We also recognize liens for general average, wharfage, stevedores' wages, and premiums of insurance, none of which are within the jurisdiction of the admiralty division of the high court of justice. We also admit claims for damage to cargoes, while the English court can only proceed against the vessel where the cargo is brought into England or Wales, and no owner is domiciled therein. It may be added that the English admiralty has jurisdiction of accounts between part owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were unable to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

The truth is that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel

necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens, and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*. When the courts of such country have obtained jurisdiction of the *res* by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold *pendente lite* will be respected in another country, though the proceedings upon which the property was originally seized fail. *Stringer v. The Marine Ins. Co.* L. R. 4 Q. B. 676.

In these cases of judicial sales *in rem* the liens of creditors are not extinguished, but are merely transferred from the *res* itself to the fund in court. The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the *lex loci contractus* he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgagees and others having liens which are not enforceable by original proceedings. As Mr. Justice Story observes, (Conflict of Laws, § 322b:) "Where the lien or privilege is created by the *lex loci contractus*, it will generally, though not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Section 323: "But the recognition of the existence

and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached had there, by law or by custom, such a superiority or priority." In *Harrison v. Sterry*, 5 Cranch, 289, Chief Justice Marshall used the following language: "The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and rather a personal privilege, dependent upon the law of the place where the property lies, and where the court sits which is to decide the cause."

It is believed to be the rule of the English as well as American courts of admiralty, after the payment of maritime liens, to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract from which the lien arose is made; or, at least, to retain the fund in court until the court of chancery shall have made an order for its distribution. *The Flora*, 1 Hagg. 298; *The Harmonie*, 1 W. Rob. 178; *The Nordstjernen*, Swab. 260; *The Gustaf*, 6 L. T. (N. S.) 660.

But even if the foreign court should misjudge this question, and hold that, by the law of Ohio, the libellant had no lien at all upon the vessel, or should deny his petition for payment from the remnants in court, the sale would not thereby be invalidated, or the vessel remain subject to arrest in this country. This was the precise question decided in *Castrique v. Imrie*, L. R. 4 H. of L. 427. That was an action of trover by the assignee of a mortgagee for the conversion of the ship *Ann Martin*. Defendant claimed title as purchaser at a judicial sale in France. The question arose whether the proceedings in the French civil tribunal were *in personam* or *in rem*. It was held that the sale ordered was not of the interest of the owner in the ship, as upon execution, but of the ship itself; and that such sale divested the title of the

plaintiff, although he had set up his mortgage in the French court, and that court had disallowed it under a misapprehension of his rights under the English law.

In delivering the opinion of the court of exchequer chamber, on appeal from the common pleas, Mr. Justice Blackburn remarked: "We think the inquiry is—*First*, whether the subject matter was so situated as to be within the lawful control of the state under authority of which the court exists; and, *secondly*, whether the sovereign authority of that state has conferred on the court power to decide as to the disposition of the thing, and the court has acted within its jurisdiction." The judgment of the exchequer chamber was affirmed by the house of lords, their lordships holding that the error of the French court in construing the law of England did not render its judgment void in a foreign country, although it would have been otherwise in a case of fraud, and that they were bound to give it effect, at least so far as to sustain the validity of the sale.

The fact that the vessel in this case was sold for the small sum of \$1,000, is due to a multiplicity of causes, amongst others the uncertainty of the law; but in the absence of fraud it cannot be considered an element in the decision of the case. I am clearly of the opinion that the sale was valid, and vested a complete title to the property in the purchaser. The libel must be dismissed.

As the cases of *The Kate Moffatt* and *The Gladiator* differ from this only in the fact that libellants' claims were rejected upon the ground that the maritime court had no authority to enforce liens which accrued before the passage of the act creating the court, a like disposition will be made of them.

IN THE MATTER OF THE PETITION OF THE BANK OF NOVA
SCOTIA v. THE PROCEEDS OF THE BRIG LILLIAN.

(District Court, E. D. New York. July 28, 1880.)

- 1 SEAMEN—WAGES—RIGHT IN FREIGHT—LIEN ON SHIP—MORTGAGEE—PRIORITY.—The rights of a lender upon the security of freight, made payable to the lender by a bill of lading, are subject to the seaman's right in the freight to the extent of his wages. Seamen may proceed for their wages against both ship and freight. When they do so proceed, and either fund is sufficient to pay them in full, the court can direct as to the mode of satisfying their decrees. The equity in the freight, created by an advance upon the credit of the freight, is no greater than the equity in the ship created by a mortgage of the ship. As between two such creditors, the equitable method is to charge the wages upon both funds, *pro rata*.

McDaniel & Souther, for the bank of Nova Scotia.

Owen & Gray, for Moran.

BENEDICT, D. J. The question presented by this petition arises as follows: The master and crew of the brig Lillian libelled that vessel, and also the freight earned upon her last voyage, to recover their wages. The vessel has been seized and sold, the proceeds amounting to \$4,000. The freight proceeded against, amounting to \$1,095.96, has also been attached. The master has obtained a decree by default for his wages, amounting to \$270.41, against both the vessel and the freight. The seamen have obtained a decree for their wages, amounting to the sum of \$264.30; also against both vessel and freight. Several other claims were presented which are not in dispute; but, after paying all liens but those of the master and seamen, there remain of the proceeds of the vessel in court more than sufficient to pay their wages without resort to the freight, and of the freight more than sufficient to pay the wages without resort to the vessel. The Bank of Nova Scotia now makes it appear that they have a mortgage upon the vessel exceeding in amount the whole of the proceeds now remaining in the registry, and having made due proof of their mortgage, and the

amount due thereon, they apply to the court, by petition, for an order directing that the wages of the master and crew may be paid out of the freight, and that the whole of the proceeds of the vessel remaining in the registry may be paid to them in satisfaction *pro tanto* of their mortgage.

James A. Moran also makes it appear that the freight in question was made payable to him, by the bill of lading, as security for certain advances made by him to pay expenses of the vessel incurred in fitting out and performing the voyage in which the freight now in the registry was earned, which advances he has shown amount to more than the amount of the freight in the registry, whereupon he asks to have the wages of the master and crew paid out of the proceeds of the vessel, and the amount of the freight in the registry paid over to him.

In this controversy the owners of the vessel have not appeared, and no claim has been made, on their behalf, to any part, either of the proceeds of the vessel or the freight. No defence was made to the demand of the master and crew, either by the owners or by the Bank of Nova Scotia, or any other person, and accordingly the master as well as the seamen have obtained decrees for their wages against both the ship and the freight. As the demands of the master and crew can be paid in full, either out of the freight or out of the proceeds of the vessel, they care not to which fund they resort for the satisfaction of their decrees, and make no opposition to any order that may be made respecting the payments of their demands. It is thus seen that this is a controversy between two creditors, one of whom has made advances on the security of the ship, the other on the security of the freight.

It has been contended, in behalf of the holders of the mortgage upon the ship, that Moran acquired no lien upon the freight by reason of his advances, and, therefore, inasmuch as his right is simply that of an assignee of the ship-owner, that the question at issue is the same as if the controversy were between the ship-owner and the mortgagee, in which case,

as the master and crew can resort to either the ship or the freight for the satisfaction of their demand, while the mortgagee can resort to the ship alone, the wages should be satisfied out of the freight, in accordance with a familiar rule in equity. This contention is partly right and partly wrong. It is undoubtedly true that Moran acquired no lien upon the freight for his advances. His right depends upon the contract made with him by the ship-owner, that the freight should be collected by him and applied to him to repay whatever might be due him for the moneys he had advanced. His interest in the freight must, therefore, be subject to that of the seamen. But it does not follow that he is thereby eliminated from this controversy, as the mortgagee contends. If he were, the same reasoning would eliminate the mortgagee. The ship-owner is the one that has been eliminated, leaving the mortgagee of the ship and the assignee of the freight the only parties to the controversy, and their right and their equities alone to be considered. (

It has been urged in behalf of the assignee of the freight that his advances were made for the purpose of enabling the ship to earn the very freight which he now claims, and a superior equity arises in his favor out of that fact. But, as before stated, the law gave him no lien upon the freight for his advances, and I am unable to see that the fact that the money was applied to payments for the outfits of the vessel for this voyage gives him any greater equity in the freight than that acquired in the ship by the mortgagee of the ship, through his advances. As between these two parties the equities are equal.

If the holder of the mortgage upon the ship has no equity superior to that of the assignee of the freight, his application to have the wages paid out of the freight cannot be granted, unless it can be held, as matter of law, that the lien of the seamen does not attach to the ship when there is freight sufficient to pay the wages, and available to the seamen for that purpose. Manifestly, no such proposition can be sustained. The seamen have a right in the freight, and at

the same time a lien upon the ship. The ship is as much bound for the payment of the wages as is the freight. The seamen may resort to either fund in the first instance, and, that proving insufficient, they may resort to the other; or, as here, they may proceed against both at the same time. When, however, they do proceed against both, and, as here, either proves sufficient, the court has the undoubted right to control the method of satisfying their decrees. And when there are two creditors whose equities are equal, one of whom is entitled to the surplus of the freight and the other to the surplus proceeds of the ship, the only equitable method is to direct that the wages be charged against both funds *pro rata*. That is to say, that out of the freight shall be paid the master and crews, upon their decrees, a sum bearing the same proportion to the whole amount of the wages as the amount of the freight bears to the balance of the proceeds of the ship in the registry, and that the remainder of the wages shall be paid out of the proceeds of the ship. The freight moneys in court after such deduction may then be paid to Moran, upon his filing his petition therefor, and the proceeds of the ship remaining after such deduction may then be paid to the Bank of Nova Scotia, upon the present petition.

LONGSTREET v. STEAM-BOAT R. R. SPRINGER.*

(District Court, S. D. Ohio. December 2, 1880.)

1. SEAMEN—IMPLIED CONTRACT FOR TRIP.—In the absence of an express agreement, the law will imply that the employment of a seaman upon a steam-boat is for the trip which she is then engaged in.
2. RIGHTS OF INJURED SEAMEN.—A seaman who, without his fault, is injured in the service of the boat, is entitled to his full wages for the trip or other period of service which he had then entered upon, and to be cured at the expense of the boat.

In Admiralty. Hearing on libel, answer and testimony.

The libel alleged that on December 13, 1879, the master engaged the libellant as fireman on the Springer for the trip from Cincinnati to New Orleans and return, at the wages of \$35 per month; that he entered upon his duties as such fireman, and that on December 17, 1879, while in the performance of the same, he was directed by said master to disengage a tree that had caught in one of the wheels of said steam-boat, and while occupied in disengaging said tree, without any fault or negligence on his part, his arm was caught between said tree and wheel, and crushed and bruised so that he was wholly disabled for the remainder of said trip; that said trip lasted 32 days, for which he claimed full wages; that he was put to expense for medical attendance and supplies and subsistence to the amount of \$50; for all of which he prayed the decree of the court.

The answer denied all of the above-mentioned allegations except the mere fact of injury, and averred that the same had been caused solely by libellant's negligence.

Bateman & Harper, for libellant.

Matthews, Ramsey & Matthews, for claimants.

SWING, D. J. The evidence, I believe, establishes an employment for a month. But even if the fact was otherwise, and there was no express agreement as to the length of the employment, the law would imply that it was for the trip. *Worth v. Steam-boat Lioness No. 2*, 3 Fed. Rep. 922; *Jansen*

*Reported by Florian Giauque and J. C. Harper, of the Cincinnati bar.

v. *The Heinrich*, Crabbe, 226. The trip having occupied a month, it makes no difference which way it is treated.

As to the question of injury: The libellant was directed by the captain, or some other superior officer of the boat, to remove the obstruction from the wheel. It was a perilous undertaking; he used all ordinary care, but was injured. I understand the law to be that where a seaman is injured in the service of the boat, without any fault on his part, he is entitled to recover his full wages for the trip or period for which he was employed, and the expense incurred in his cure. *Neilson v. The Laura*, 2 Sawy. 242; *The North America*, 5 Ben. 486; *Morgan v. The Ben Flint*, 6 Am. Law Reg. (N. S.) 707; S. C. 1 Abb. U. S. 126; *Sims v. Jackson*, 1 Wash. 414; *The Nimrod*, Ware, 1, 9; *The Forest*, Id. 420; *Harden v. Gordon*, 2 Mass. 541; *Reed v. Canfield*, 1 Sumn. 195. This is a well-established doctrine of admiralty law; and, the libellant having brought himself within the rule, he is entitled to recover.

There is no dispute as to the fact that the libellant was severely injured, and, in consequence thereof, unable to perform his duties as fireman during the remainder of the trip. The evidence shows that he was to receive \$35 per month; that the expense of medical attendance amounted to \$15, and of ice, medicines, and other supplies furnished during sickness, \$10; in all, \$60; and a decree will accordingly be entered for that amount.

ETTING and others v. MARX'S EXECUTOR.

(Circuit Court, E. D. Virginia. June, 1880.)

1. EQUITY — STATUTE OF LIMITATIONS — CONCURRENT JURISDICTION.—A court of equity is only bound to apply the statute of limitations where its jurisdiction is concurrent with that of a court of law.
2. SAME—SAME — EXCLUSIVE JURISDICTION.—A court of equity generally acts in analogy to the statute of limitations, but is not bound by it, where its jurisdiction is exclusive of that of a court of law.
3. SAME—SAME — LACHES. — A court of equity, however, does not act in analogy to the statute of limitations where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights.
4. SAME—SAME—TRUSTEE AND CESTUI QUE TRUST.—It is a general rule that, as between a trustee and his *cestui que trust*, neither the statute of limitations, nor the rule of analogy, nor lapse of time will, in general, affect the right of the beneficiary to redress; yet equity will in such cases, when the circumstances require it, enforce against the *cesti que trust*, especially where the rights of third persons are concerned, its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*.
5. SAME—SAME—SAME.—Among such exceptional cases are (1) those in which the public convenience requires that there shall be a speedy end of strife; (2) those in which some of the principal parties, in transactions sought to be reviewed, are dead and their vouchers lost; (3) those in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; and (4) those in which the disturbance of purchasers or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons.
6. SAME—SAME—SAME—ACQUIESCENCE.—*Held*, under the circumstances of this case, that an acquiescence for 12 years in an investment of a trust fund in confederate bonds would prevent the *cestuis que trust* from recovering the scaled value of the confederate money with which such bonds were purchased, at the expense of the subsequent creditors of the trustee.
7. TRUSTEE AND CESTUI QUE TRUST—COVERTURE.—*Held, further*, that such *cestuis que trust* were not barred from suing the trustee by coverture, or by being otherwise not *sui juris*.

In Chancery.

Samuel Marx, of Richmond, Virginia, died in the fall of 1860, leaving a large estate, consisting in part of real estate,
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but chiefly of valuable stocks and bonds. He left a will appointing his brother Dr. Frederick Marx, his nephew Edward Mayo, both of Richmond, and another who never qualified, his executors, and also trustees for the trusts created by his will; and devised to Frederick Marx, and certain of his adult nephews, certain portions of his estate in absolute right, and to his executors the residue thereof; but charged them as trustees, as to these portions, with certain trusts in favor respectively of Judith Meyers, Harriet M. Etting, Caroline Barton, and Adeline Mayo, his married sisters then living; and of certain daughters of his deceased sisters Louisa Myers and Frances Etting. He directed all his real estate and personalty to be sold as soon as possible after his death, and those proportions of the proceeds which were not devised absolutely to be invested in good and secure stocks, with power in the trustees to convert them into other stocks, the securities to be taken in the names of the executors for the beneficiaries named in the will, and to show on their face for whose benefit they were respectively to be held; and provided that these securities should have the character of realty in the event of the death of those entitled.

Frederick Marx was the only one of those named as executors who qualified shortly after the death of Samuel Marx, which he did on the thirteenth December, 1860. He seems to have filed an appraisal of the estate in due time, according to law, and to have accounted regularly, before a proper commissioner, as to his transactions for the years ending December 13, 1861; December 13, 1862; December 13, 1863; and for the subsequent period ending September 7, 1864. I believe that it is admitted that he made the sales and investments required by the will in good faith; no fraud being charged or pretended in regard to any of his transactions.

On November 26, 1864, up to which time Frederick Marx had acted as sole executor and trustee, he turned over to Edward Mayo, who had then just qualified as executor and trustee, all the stocks, bonds, funds, and estate in his hands,

taking minute and detailed vouchers and receipts from him; and from the time of doing so he does not seem to have had any actual connection with the estate or the trusts of the will, either in the capacity of executor or trustee; and this fact seems to have been well known to complainant and petitioner. The subsequent accounts of Edward Mayo, made up by commissioners of court, show that Frederick Marx had turned over the estate in the manner just stated to Edward Mayo.

The disconnection of Frederick Marx from the estate at the date named seems to be acknowledged by the bill and recognized by the decree in a friendly suit which was instituted in the circuit court of Richmond in March, 1869, entitled *Etting et al. v. Marx et al.*; the object of which was to substitute as trustee for Mrs. Etting, then under coverture, Francis M. Etting, one of her adult sons, in the place of Edward Mayo. It is not pretended that Frederick Marx acted or was considered as acting in the capacity of executor or trustee, after November 26, 1864, whatever his legal relation to the trust might have been. The bill in the friendly suit just named recites that the powers of Frederick Marx had been revoked after he had "acted for a time." The transactions of Frederick Marx in the years 1861, 1862, and 1863, in the securities of the estate, were very large, aggregating probably \$75,000. After 1861 they consisted of sales of stocks for confederate money, and in the exchange of one sort of bonds for another, and of stocks in the name of Samuel Marx for those in the name of the executor for the respective beneficiaries of the trusts of the will.

These transactions are not brought in question in the present litigation; but in the year 1864, or chiefly in that year, Frederick Marx bought, with confederate money received for other stocks, a large amount of the bonds of the confederate government. The securities of every name which Frederick Marx held as the result of his transactions under the will were, as before stated, all turned over on November 26, 1864, by him to Edward Mayo, and Edward Mayo has duly turned over all of them except the confederate bonds to the persons entitled. The confederate bonds, however, were refused by some of the

beneficiaries; and the object of the present litigation is to recover of the representative of Frederick Marx the scaled value of the confederate money he received in 1864, or chiefly in that year, and which he expended in the purchase of the confederate bonds which have been refused by some of the beneficiaries of the will of Samuel Marx. The suit was brought by Harriet M. Etting, who became *sui juris* on the death of her husband in 1870. It was brought in February, 1877, and those of the other beneficiaries who have been disposed to join in the litigation have come in by petition. The controversy is chiefly in regard to the confederate bonds. A smaller matter, also in controversy, is that presented by the petition of Moses Myers, for whom Frederick Marx made a deposit of \$3,004 in the Bank of Virginia at Richmond on May 6, 1863, Myers being then in the federal lines, and not having notice of the deposit at the time, nor at any time before April, 1865, when it became worthless by the insolvency of the bank.

Frederick Marx was married in 1874, and died in the beginning of 1877, shortly before the filing of Mrs. Etting's bill. He left debts to the amount of \$5,200, contracted, I believe, within a few years before his death; none of which could be paid if the claims of the complainant and petitioners in this litigation were sustained by the court.

Harriet M. Etting became *sui juris*, as before stated, in 1870. In March, 1869, during her coverture, her son, Frank M. Etting, who was then an adult, was substituted, on her own prayer, for Edward Mayo, as her trustee, by decree of the circuit court of Richmond, as before mentioned. Very soon after the appointment of Frank M. Etting as such trustee all the securities which Edward Mayo held for Mrs. Etting, which had been turned over by Frederick Marx in November, 1864, were turned over to Etting by Mayo, and were all received, except the confederate bonds.

In a letter of June 18, 1869, occupied almost exclusively with statements and inquiries about the stocks and bonds which had been forwarded to him by Mayo, Frank M. Etting wrote to Edward Mayo, on one point, as follows:

"I must here take occasion to say that we have heard, accidentally, that Uncle Frederick had been told (in some unfortunate discussion with a member of the family) that it was our intention to take legal steps against *him* in consequence of some of his investments. Such statement *was utterly without* foundation. Mother's remark on hearing of it was that there were but few of the family left, and she would never consent to such a course for 50 times the amount. I join most entirely in the feeling, and I beg you will assure Uncle Frederick of this. However unfortunate the results have been, no one of our family has ever ascribed to him any action inconsistent with his near relationship, or his character as an honorable man; nor has any remark been made in my presence but what might well be repeated in his. I regret it should be necessary for me to give such assurances; but this is not the first time that an effort has been made to create differences in the family—always bad enough, but tenfold worse if arising from mere pecuniary considerations. Aside from any claim of any kind, and with no intention of action in the matter, I still (to be perfectly frank with you) cannot feel justified in my own eyes in receipting for certificates of confederate stock. I do not want to embarrass your settlement in any way, or delay it, and we will see what can be done as soon as I have more time."

In a letter of kinship dated July 3, 1869, Frank M. Etting wrote, among other things, to Edward Mayo as follows: "I transmit herewith a receipt, etc.; also return what I am not entitled to give a receipt for. The money so invested has gone, but I think all can say, let it go." He alluded to the confederate bonds.

John A. Coke and *W. W. Henry*, for complainants.

John S. Wise, for defendant.

HUGHES, D. J. There is little to be considered in this case, except the liability of the estate of Frederick Marx for the scaled value of the confederate money, which, in 1864, or chiefly in that year, he invested in confederate bonds. No one disputes that these bonds were an illegal object of invest-

ment. All investments in them have been irrevocably decided to be void, as having been made "in aid of the rebellion."

It is not charged, however, that there was, on the part of the deceased trustee, any fraudulent motive or intention, moral or political, in making the investments. There is no element or charge of fraud, actual or constructive, in the present case; and so the only question is one of liability for a well-intended but illegal act. Nor can it be denied that the estate is liable for these investments, unless it has been absolved by the bar of the *statutes of limitations*, or by the *laches* of the complainant and petitioners in this suit, or by their *acquiescence* so long as to render the enforcement of their demands, at this late day, derogatory to the rights, interests, or equities of others, which have resulted from that protracted acquiescence.

As to the statutes of limitations I do not think they affect this case, either directly or by analogy. In general, equity merely follows the analogies of the law in respect to limitations. A court of equity is *bound* to apply the statute only in cases where the courts of law and equity would have concurrent jurisdiction; that is to say, where the complainant might have gone into a court of law with his cause instead of coming into chancery. "In such cases courts of equity consider themselves within the spirit of the statute and act in obedience to it; but, in the consideration of purely equitable rights and titles, they act in analogy to the statute, but are not bound by it." *Hall v. Russell*, 3 Saw. 515. "In all cases of concurrent jurisdiction, at law and in equity, statutes of limitations seem equally obligatory in each court; and courts of equity do not act so much in analogy to the statutes as in obedience to them." 2 Story's Eq. Jur. 1520. In a great variety of other cases, however, courts of equity act only upon the *analogy* of the limitations at law, and not in *obedience* to the statutes. A leading and very instructive case on this subject is *Havenden v. Lord Annesley*, 2 Sch. & Lefroy, 629 *et seq.*

There is also still another class of cases in which equity courts disregard both the statutes of limitations and the

principle of analogies, and act on considerations peculiar to themselves; that is to say, "on their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross *laches* in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." 2 Story's Eq. Jur. 1520.

Thus, to recapitulate, there are three classes of cases with reference to the bar of time—*First*, those in which equity is bound to apply the statutes of limitations; *second*, those in which it merely acts in analogy to those statutes; and, *third*, those in which it is neither bound by nor acts upon the principle of analogy to them, but proceeds on doctrines peculiar to and inherent in itself.

The present is not a case of the first class. It is not a case in which the jurisdiction of law and equity is concurrent, and in which the complainants might have gone into one court or the other at option. It is a suit between *cestuis que trust* and a trustee; a case within the exclusive jurisdiction of equity; for, though the law courts have jurisdiction in a few cases of the simpler trusts, yet, in general, equity has exclusive jurisdiction over trusts. "Estates vested in persons upon particular trusts and confidences are wholly without cognizance at common law, and the abuses of such trusts and confidences are beyond the reach of any legal process." 1 Story's Eq. Jur. 29.

It is elementary law that trusts are exclusively within the cognizance of equity. The present is not, therefore, a case of concurrent jurisdiction of law and equity, and is not one in which I am bound by the statutes of limitations. Many, and, indeed, most of the suits in chancery, in which the trustee and *cestui que trust* are parties on one side, and others are parties in adverse interest on the other, rank in the first class of cases that have been mentioned, where equity is bound by the statutes of limitations. An instance of such cases was that of *Livesay v. Holms*, 14 Grat. 441. A widow had qualified as administratrix of her husband, and taken possession of and held slaves, in which she claimed a life

estate under her father's will. She was afterwards removed from her office of administratrix, but continued to hold the slaves for more than five years after such removal. *Held*, that the statute of limitations will protect her against any claim by the administrator *d. b. n.*, and next of kin of her husband, and that the fact that one of the next of kin had been a married woman during the whole period, will not prevent the running of the statute against her. This was a suit in equity, but might have been brought at law.

Nor do I think the case at bar falls within the second class of cases that have been described—those in which courts of equity follow the analogies of limitation enforced at law. Those are cases in which, though cognizable exclusively in equity, the reason of the law of limitation applies as cogently as in suits at law. The instances of this class mentioned by Judge Story are suits for real estate, where there has been adverse possession for 20 years, brought, say, by a mortgagee; and suits brought to subject real estate to the liens of judgments, where there has been no effort to enforce the judgments for 20 years. The mere fact that equity has jurisdiction to foreclose a mortgage, or enforce the lien of a judgment, upon real estate, is held not to effect the reason of the law of limitations which bars actions at law after certain periods of time. It cannot be pretended that the present suit falls within that class of cases.

I conclude that it falls within the third class, to-wit, that in which equity, wholly ignoring the statutes of limitations by which the law arbitrarily bars actions after periods of time arbitrarily fixed, assumes the untrammelled prerogative of deciding, upon the circumstances of the particular case before it, whether the complainant has used such diligence in exhibiting his demand as the nature of the case required; and whether, in giving him relief after such delay as has occurred, the court can be certain not only of his right to it, but also that it can be granted without injury to the rights of persons who may be thereby injured in consequence of the delay.

A review of the cases of this latter class which have been decided by courts of equity will reveal a great elasticity in the

period which has been held sufficient to disentitle complainants from recovering their demands. In regard to fraud, though it is settled that no lapse of time will bar so long as it is concealed, and that neither the statute nor the principle of analogy will begin to run except from the time the fraud is unkenneled, yet it is equally settled that if there be laches or acquiescence, and unreasonable delay after that event, equity will then apply its usual principles in determining whether or not to grant the relief demanded. It is equally a rule that, as between a trustee and his *cestui que trust*, neither the statute, nor the rule of analogy, nor lapse of time will, in general, affect the right of the beneficiary to redress; yet equity will in such cases, when the circumstances require it, enforce against the *cestui que trust*, especially where the rights of third persons are concerned, its own peculiar maxim, *vigilantibus et non dormientibus jura subserviunt*; and while there are cases of this class where equity has granted relief after a great length of time, even 50 years, yet there are others in which it has refused it after only a few months.

Among the cases which have been held not to be affected by the statutes of arbitrary limitations, or the rule of analogy to them, are (1) those in which the public convenience requires that there shall be a speedy end of strife; (2) others in which some of the principal parties, in transactions sought to be reviewed, are dead and their vouchers lost; (3) others in which the court could not be certain, from lapse of time, that relief, apparently proper, would certainly be just; (4) others where the disturbance of purchases or transactions acquiesced in for a greater or less time would prejudice the vested rights of third persons. The following are the more important of the cases, falling within the classes which have been named, which have been cited at bar. In *Bryan et al. v. Weems*, 29 Ala. 423, it was held that the statute of limitations barred a trustee who had neglected to sue for slaves held subject to a trust during the period of statutory limitation; and that the rights of the *cestui que trust* were also barred. In *Flanders v. Flanders*, 23 Ga. 249, which was a suit by the widow of an intestate and a married daughter and husband to set aside

the sale of a slave by the administrator alleged to have been made to himself, more than ten years after the sale was made, it was held to have been brought too late, the widow having been 10 years *sui juris*, and the daughter four years through marriage; the delay being unreasonable.

In *Hough v. Coughlan*, 41 Ill. 131, there had been a contract by bond for the conveyance of land, and after 12 years a bill was brought for specific performance, and the court held that there had been unreasonable delay: "That great delay of either party unexplained, in not performing the terms of a contract, or in not prosecuting his rights under it by filing a bill, or in not prosecuting his suit with diligence when instituted, constituted such *laches* as would forbid the interference of a court of equity."

In *Mitchell v. Berry*, 1 Met. (Ky.) 619, it was held, where a *cestui que trust* desires to avoid a sale of his estate, at which the trustee has become the purchaser, he must apply to chancery in a reasonable time after he had knowledge of the facts which impeach the sale, or he will be presumed to have acquiesced, and that reasonable time depends upon the circumstances of the case, and the discretion of the court. In the particular case before the court an acquiescence of 12 years was held sufficient to disable the parties from coming into a court of equity.

In *Davison v. Jersey Co.* 71 N. Y. 333, there had been a contract for building houses by May 1, 1859, and for purchase and deeds. Suit was brought for specific performance in 1864, and it was held that the rights of complainant were, under the circumstances of that case, forfeited by *laches*.

In *The State v. West*, 68 Mo. 229, the testator of defendants, having bought certain land in his own name at a sale made by order of the county court, on the twenty-third day of April, 1873, to satisfy a school mortgage, on the twentieth day of September, 1873, resold it at an advance, and on the second day of January, 1874, died. The county court knew of the purchase by the deceased soon after it was made. On the eighteenth day of June, 1874, 15 months after the purchase, the county court brought suit to recover of defendants

the profits made by deceased on the resale, claiming that he was acting as agent of the county; but the court held that, if the county ever had a cause of action, it had been guilty of such *laches* as made it doubtful if this suit could be maintained. The court say: "Under such circumstances, the *laches* must, of itself, be held fatal, for it would be to assert a doctrine to the last degree hazardous to say that a complainant, with full knowledge of all the facts on which he relies, can lie quietly until death comes to his assistance, and puts a seal of perpetual silence upon the lips of his adversary."

In *Atkinson v. Robinson*, 9 Leigh, 393, it was held that every claimant who asks relief of equity ought to exhibit his claim within a reasonable time, so that, in giving him a decree, the court may not do injustice to the defendant.

In *Robertson v. Read*, 17 Grat. 544, where there had been a settlement between partners in 1819, and transactions in pursuance of the settlement in 1820, and in subsequent years down to 1831, and suit was brought in 1834 for an account, and claiming money by the administrator of one of the partners who had died against the other partners who were living, it was held that a claim, probably just originally, must be rejected and disallowed in consequence of its staleness, and of the probable impossibility, from the lapse of time and the death of parties, of ascertaining the facts of the case and doing justice, and also because it might reasonably be presumed that the said claim had been abandoned or satisfied.

In *Harrison v. Gibson*, 23 Grat. 212, it was held that if from the delay which has taken place no correct account can be taken between the parties to the action, and the transactions of parties have become obscured by death of some of them; and if, under the circumstances of the case, it is too late to ascertain the merits of the controversy, the court will not interfere, whatever may have been the original justice of the claim.

In *Hudson v. Hudson*, 3 Rand. 117, where a bill for an account had been filed in 1810 for the settlement of transactions of a deceased person's executors, under a will under which they had qualified in 1789, and had been dismissed by

the chancellor on the merits, it was held that any subsequent suit would not be entertained, and that the court would presume, from the long acquiescence of all parties in the action of the executors, that the estate had been finally and properly settled.

In *McKnight v. Taylor*, 1 How. 161, it was held by the supreme court of the United States that, in matters of account not barred by the statute of limitations, courts of equity may refuse to interfere, after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice, where the original transactions have become obscure by time, and the evidence may be lost.

In *Badger v. Badger*, 2 Wall. 89, the same court, in holding that, except in certain cases, courts of equity will, acting on their inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish state trusts, remarked, at page 94: "There is a defence, peculiar to courts of equity, founded upon the lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, * * * courts of equity refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor." Important learning on the general subject may also be found in *Brown v. Brown*, 95 U. S. 161; *Goddin v. Kimmell*, 99 U. S. 211; and *Wood v. Carpenter*, 101 U. S. 235.

The case at bar, if it falls within any class of cases which have been described, and of which examples have been cited in the foregoing review, falls within that alluded to in the case of *Badger v. Badger* last cited, where the long acquiescence of the parties claiming rights, in the action of those against whom they claim, has created a presumption that they have abandoned their rights, and where the enforcement

of those rights now would produce hardship and injustice to third persons.

Perry says, (see 2 Trusts, § 870 :) "Acquiescence in a transaction may bar a party of his relief in a very short time. If one has knowledge of an act, or it is done with his full approbation, he cannot afterwards have relief. He is estopped by his acquiescence, and cannot undo that which has been done." He cites the English cases of *Kent v. Jackson*, 14 Beavan, 384; *Styles v. Guy*, 1 Hall & Twells, 523; and *Ex parte Morgan*, 1 Hall & Twells, 328, which I have not been able to consult.

In the case of *Graham v. Railroad Co.* 2 McNaughton & Gordon, 156, 158, Lord Cottenham, refusing relief after an acquiescence of only 18 months, said that the question was whether the equity set up by the complainant was not counteracted by a counter equity on the other side; "for in many cases the interposition of the court may produce the greatest possible injustice if the parties have not applied in time, but have permitted things to get in that state which makes the injunction asked for not only a proceeding not enforcing an equity, but calculated to inflict great hardship and injustice." And in another place, in the same case, he says: "If those who have the management of the affairs of others depart from the regular course, and there is an acquiescence, the parties interested who have so acquiesced cannot complain."

It being, therefore, a settled doctrine of equity jurisprudence that men may bar themselves of equitable rights by such acquiescence, as, if those equities were enforced, would injuriously affect the interests or rights or equities of third persons, it is obvious that this acquiescence and its results must be considered by a court of equity with no reference to the arbitrary periods established as bars to suits by statutes of limitations; and, as to such cases, nothing could be more mistaken than the remark of the dissenting judge in the Missouri case of *The State v. West*, that to apply the doctrine in a case where there was an acquiescence for only 15 months, as that was, "would be going far beyond any decision ever made in England or America."

This being a recognized doctrine of equity, I have now to inquire whether there was an acquiescence in the action of Frederick Marx, in regard to the confederate bonds, such as created counter equities which would be overthrown by granting the relief sought by the complainant and petitioners in this cause.

It abundantly appears from the record that to grant this relief would sweep away the whole estate of Frederick Marx, and leave nothing for his creditors at large, whose claims exceed \$5,000. It is claimed in the pleadings, and is doubtless conceded by all the parties to this cause, that Frederick Marx was an honorable man, and would not have contracted debts to so large an amount as \$5,000 if he had not felt assured that no reclamation would be made upon him for his illegal investment in confederate bonds. But even though he had been capable of incurring these debts in a condition of conscious insolvency, yet, if suit had been brought within a reasonable time after the close of the war, his credit would, most probably, have been so impaired that the present creditors of the estate would not have been apt to trust him to the extent of \$5,000.

I cannot but believe that this large indebtedness to general creditors is the result of the acquiescence of the complainant and petitioners in his illegal investments for a period of 12 years after they could have sued him, and during the whole remainder of his life. By their own neglect to sue they perpetuated his credit with the public, and they threw him off his guard in the contraction of debts. It is very clear that they might have sued as early as the spring of 1866, when the courts of Virginia were re-instated under the Pierpoint government. The stay laws of Virginia, enacted during the war, affected little other than final process for the collection of debts, and sales under decrees and trust deeds. They forbade no other proceedings in court than trials by jury, and put no restriction whatever upon suits in equity. So, likewise, the stay laws of 1866 and 1867 stayed only the "collection of debts." Suits might be brought for the *establishment* of debts *ad libitum*, in Virginia, from the spring of 1866 to the present

time, and their *collection* was stayed no longer than the first of January, 1869; eight years and a month before this suit was brought. Suits might have been brought in this court at any time after 1865. Certainly an acquiescence of more than 11 years in the action of this trustee, accompanied by such assurances as those given eight years before death by Frank M. Etting, in his letters of March and July, 1869, which have been quoted, and by results in the form of new debts incurred afterwards to the amount of \$5,000, which are hopeless of payment, if the demands of the complainant and petitioners are allowed, would seem sufficient to bring the case within the doctrine of the loss of equities by acquiescence.

As may be inferred from the foregoing, I do not agree with counsel for complainants in the proposition that Mrs. Etting was barred from suing by coverture, or that the complainants were barred from suing by being otherwise not *sui juris*.

In *Harrison v. Gibson*, 23 Grat. 212, it was held that though a bill by husband and wife in right of the wife is the bill of the husband, and the wife is only joined for conformity, yet the coverture of the wife is not therefore an excuse for delay in bringing suit; and it was also held that though a delay of 14 years after a right has accrued does not create a statutory bar, it will, in connection with other circumstances, be very persuasive against the justice of the claim, which the court in that instance refused to sustain.

I think the bill and petitions must be dismissed. I will so decree.

NOTE. There was no appeal in this case, the complainants acquiescing in the decision of the court.

NORTHERN PACIFIC RAILROAD COMPANY v. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY and others.

(Circuit Court, D. Minnesota. December, 1880.)

1. **INJUNCTION—BOND OF INDEMNITY.**—Courts of equity will sometimes substitute a bond of indemnity for an injunction, if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation.
2. **SAME—SAME.**—It is within the ordinary powers of a court of chancery to accept such a bond when proceeding according to the general principles of equity.
3. **FEDERAL COURTS—EQUITY.**—Such general principles are administered by the federal courts of equity in all cases, and in every state, irrespective of local laws and state practice.
4. **INJUNCTION—BOND OF INDEMNITY.**—*Held*, therefore, in this case, where a prompt assessment of damages could not, in all probability, be had, and where the right of the complainant to any damage was a matter of dispute, depending for its solution upon doubtful questions of law and fact, that a court of chancery might, instead of stopping the progress of a great work of internal improvement, of general and public as well as of private importance, require a bond to be given, and allow the construction to go on.

Motion to Dissolve Injunction.

Gilman & Clough, for complainant.

R. B. Galusha and Bigelow, Flandrau & Clark, for respondents.

MCCRARY, C. J. The complainant owns and has for years operated a line of railroad running across the state of Minnesota, constructed by virtue of authority conferred by certain acts of congress in this bill mentioned. The respondents are the owners of another line of railroad, now in process of construction under authority conferred by the state of Minnesota, as alleged in the answer. Each of these companies has power to acquire, by purchase or condemnation, the land required for right of way, depot, grounds, etc. The lines of the two railroads cross each other at a point near Fargo, in the state, the exact point of crossing being on the N. W. $\frac{1}{4}$ of section 9, township 139, range 8, in the county

of Clay, Minnesota. In 1872 the plaintiff company entered upon this land and took, without condemnation, so much of the same as is now occupied by it for right of way, and has ever since operated its railroad across the same.

At the time of the passage of the act of congress incorporating the complainant company, the land in question was public land; but at the time of the definite location of the line of the road under that act said land was owned by one J. S. Schreiber, who in the meantime had obtained a patent therefor, and from whom, through several mesne conveyances, the title passed to the respondents. No proceedings under the statute of Minnesota to recover damages for the right of way were ever instituted by said Schreiber, or any of his grantees, against the complainant. The respondents claim, under these circumstances, that they are the owners of the land and have the right to construct their railroad across it, and in doing so to cross the track of complainant, without making compensation. The complainant claims that it has a vested right and a valuable property in its right of way, which cannot be taken by the respondents without condemnation, under the statute, and payment of damages. Numerous questions arising upon the admitted facts have been discussed by counsel, the more important of which are the following: *First*. Whether, under the charter of the complainant company, (act of congress of July 2, 1864,) that company acquired the right of way over all lands that were public at the time of its passage, or only over such as were public at the time of the location of the line. *Second*. Whether the respondents, or those under whom they claim, had a complete title to the *locus in quo* at the time the complainant entered upon the same; and, *third*, if so, whether by permitting the complainant to take the right of way, and use the same for eight years, the respondents and their grantors lost their rights therein, and the complainant acquired a vested right. *Fourth*. Whether the respondents' right to claim so much of the land as is embraced within complainant's right of way is barred by section 7 of the aforesaid act of congress.

Besides these questions, which arise upon the admitted
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facts, there is another which depends for its decision upon facts which are controverted. It is alleged in the answer that the plaintiff well knew that the enterprise in which respondents had embarked "involved the crossing of plaintiff's road at or near the point of crossing aforesaid, and that the place and manner of said crossing, as aforesaid, were fully explained to the plaintiff, and that the plaintiff expressly assented to and approved the place and manner of crossing as aforesaid, and represented to the defendants, and gave them to understand, that they could and should be permitted to build and operate the said Barnesville & Moorhead Railroad across the said plaintiff's road at the place aforesaid whenever and as soon as they desired so to do, and that they would assist in effecting such crossing, and that no obstacle would be interposed thereto; and that after such representations and license, and in firm reliance upon the same, and without and before any notice or knowledge that the said representations would not be carried out in good faith, or of any design on the part of the plaintiff to interpose any obstacles whatever to such crossing, or to attempt so to do, the said defendant companies went on and expended large sums of money in the construction of said road, to-wit, several hundred thousand dollars," etc. These allegations are denied by certain affidavits filed by complainant; but it is manifest that the question of fact thus presented cannot be finally decided until the final hearing upon the testimony. The right of the complainant to damages for the crossing of its track on the land above described, by the respondents' railroad, depends upon the decision of these several questions, some of which are by no means free from difficulty, and one of which (the last named) cannot be finally determined until the final hearing. In such a case the usual course is to continue the injunction in force, and thus keep the parties in *statu quo* until the final hearing. But this rule has its exceptions. Courts of equity will sometimes substitute a bond of indemnity for an injunction, if the ends of justice will thereby be promoted, and especially if any public interest may suffer by continuing the injunction in force pending the litigation. There are several cogent rea-

sons which should impel us to adopt this latter course in the present case, if, upon examination, it is found to be within our discretion to do so.

1. Whatever doubts we may have upon other questions, we have none as to the absolute right of the respondents to build their railroad along the line specified in their charter, and to cross the line of the complainant at the point in controversy, upon paying the damages, if it be finally decided that complainant is entitled to damages, and without such payment, if, upon final hearing, it shall be so determined. The most that the complainant is entitled to is its damages; and if that be amply secured its rights are protected.

2. The case is peculiar in this: that the controversy is not as to the amount of damages, but as to the right of complainant to any damages. It is not a controversy that can be settled in a few days by the appointment of a board of commissioners to assess the damages of complainant. As already suggested, the right of complainant to damages may depend upon a disputed question of fact, which cannot be determined until proofs are taken in the regular course of proceedings. Enough has already appeared in the case to satisfy us that a somewhat protracted litigation may precede the determination of the question of damages. Already the proceedings instituted in the state court for the purpose of having the complainant's damages assessed have been interrupted and delayed by removal thereof into this court, where they are now pending. We will not anticipate, much less decide, any of the questions that may arise here in that proceeding. It is enough for the present to say that the controversy which must precede an assessment and payment of damages in this case may be protracted.

3. The public is interested in the construction of new lines of railway, which are indeed only improved highways. The policy of the law is to encourage and facilitate such construction. The statute of Minnesota provides for railroad crossings upon the theory that the public interest requires that these highways of commerce and travel should run in different directions over the state, and that no one line shall

erect a barrier not to be passed by others. It is manifest from these considerations, and others that might be named, that the respondent companies ought to be permitted to complete their line across that of the complainant at the earliest moment compatible with the full and complete protection of the rights of the latter. That these rights can be fully and completely protected by requiring the respondents to give bond with approved security to pay the damages which may be awarded to complainant, is entirely clear.

But we are met with a question as to the power of this court in a case of this character to adopt this course. It is not necessary to cite authority to show that to accept such a bond is within the ordinary powers of a court of chancery when proceeding according to the general principles of equity. It is a mode of proceeding, not only authorized by the general principles of equity jurisprudence, but it is in common use in courts of chancery, and especially in federal courts. In patent cases, for example, where it is supposed that an injunction to restrain the use of a patented article may operate injuriously, the complainant is protected by a bond to account for profits and pay damages instead of an injunction. It is only necessary to add that the federal courts of equity administer the same general principles in all cases and in every state, irrespective of local laws and state practice. If the court has jurisdiction to try and determine a case in equity, it must determine it according to these general principles, which are the same in every state. *U. S. v. Howland*, 4 Wheat. 115; *Boyle v. Zacharie*, 6 Pet. 658; *Never v. Scott*, 13 How. 268; *Noonan v. Lee*, 2 Black, 499.

It is not necessary, in view of these authorities, to decide what the power of a state court might be in a case of this character; but we see nothing in the statute which in our judgment ought to be construed to forbid a court of chancery of the state to accept a bond under the circumstances disclosed by the record in this case. It may be suggested that a bond cannot be substituted for payment of the damages. After the damages are assessed, the amount ascertained, this may be so. But the question here is, whether, in a case

where a prompt assessment cannot in all probability be had, and where the right of the complainant to any damage is a matter of dispute, depending for its solution upon doubtful questions of law and fact, a court of chancery may, instead of stopping the progress of a great work of internal improvement, of general and public, as well as of private importance, require a bond to be given, and allow the construction to go on. The statute itself recognizes the propriety of substituting a bond for the actual payment of the damages, even after assessment, in case an appeal is prosecuted. See section 23, c. 34, St. Minn.

It is said to dissolve this injunction and accept a bond instead would in effect authorize the respondents to commit a trespass, if not a crime, by laying their track across that of complainant. After this court has decided that upon giving bond the respondents may extend their track across that of complainant, and after such bond shall have been given and approved, the right of the respondents to go on with the construction of their line and to cross that of the complainant will be no longer open to dispute or question. The case is before us; our jurisdiction of the parties and the subject-matter is complete.

The order will be that the injunction be dissolved upon the execution by the respondents to the complainant of a bond, with sureties to be approved by a judge of this court, in the sum of \$5,000, conditioned that the respondents will pay all damages which may be awarded or adjudged in favor of complainant by reason of the construction of respondents' line of railway across that of complainant.

NOTE. See *Northern Pacific Railroad Co. v. St. Paul, Minneapolis & Manitoba Railway Co.* 3 FED. REP. 702, and *Northern Pacific Railroad Co. v. B. & M. R. Co.*, ante, 298.

FIRST NAT. BANK v. BISSELL, FOSS & HUNTER.

(Circuit Court, D. Colorado. June 26, 1880.)

1. **CONTRACTS—AGREEMENT TO NEGOTIATE FOR PROPERTY.**—An agreement between two or more persons to negotiate for the purchase of specific property, does not vest any right in either, unless such agreement is consummated by a purchase of the property.
2. **SAME—AGENT—TRUSTEE.**—An agent for the purchase of property cannot be declared a trustee for his principal, when he repudiates the agency, and purchases the property with his own funds.
Burden v. Sheridan, 36 Iowa, 125.
3. **TENANTS IN COMMON—PURCHASE BY CO-TENANT.**—A purchase by one co-tenant of the interest of another does not enure to the benefit of all the remaining tenants in common.
4. **MINING PARTNERSHIP—RETIRING PARTNER.**—In a mining partnership the firm has no right of pre-emption as to the interests of retiring partners in the mines.
5. **PURCHASE OF MINING INTERESTS—CONTRACT—CO-TENANT—PARTNER.** Therefore, a tenant in common of mining property, and a partner in the working of the mine, cannot claim any benefit in the clandestine purchase of the interests of certain co-tenants and retiring partners by two of his co-tenants and partners, although he had previously agreed with one of the purchasers to negotiate for the purchase of such interests for their joint benefit, and was then willing to pay his share of the purchase money.

In Equity.

L. C. Rockwell, for plaintiff.

W. S. Decker and *D. P. Dyer*, for defendants.

HALLETT, D. J. In the month of September, 1878, Charles R. Bissell, Simon H. Foss, and Absalom V. Hunter owned in equal parts three-fourths of the Winnemuc mine, and three-fourths of seven-sixteenths of the New Discovery mine, near Leadville, in this state. The remaining one-fourth interest in the same property was owned by Edward Handley, George W. Robertson, and Amos B. Rawlings, and all were engaged in working the mines, which were very productive. In their relations to each other as owners of the property the parties named were tenants in common; and in respect to their operations in working and mining on the property they were mining partners. As to their partnership relation, nothing more is shown than the fact that they were working the

mines and sharing in the proceeds according to their respective interests, so that the relations of the parties were not the subject of express contract, and must be ascertained from their ownership of the property and their conduct in working it. In the month of September, 1878, the parties were greatly harassed by adverse claimants of the property, and Handley, Robertson, and Rawlings became anxious to dispose of their interest. The Winnemuc property was known to be valuable, having yielded about \$40,000, which was paid for the seven-sixteenths interest in the New Discovery in this month of September. There was also in bank to the credit of the company something like \$16,000, one-fourth of which belonged to the Handley party. Bissell and Foss, who were on the ground, were anxious to purchase the interest so offered, not solely on account of its intrinsic value, but also to prevent adverse claimants from acquiring an interest in their title, and thus securing a foothold on their side. So anxious were they that they agreed to decry the property as much as possible, and to magnify the dangers besetting it, in order to increase the alarm of the Handley party and induce them to sell at a low price. The subject of the purchase became a matter of consultation and conference between Bissell and Foss, and they agreed as to the propriety of making it, if the property could be had at a reasonable price. But it does not appear that there was any definite understanding as to what sum should be paid for it, or where the money for that purpose should be obtained. Whether the money in bank to the credit of the company was available for that purpose, or had been pledged to persons who had entered themselves as surety in certain attachment suits which had been brought against the company, has become a subject of controversy in the record. Probably it was a part of the plan to represent to the Handley party that the money in bank was so pledged in order to induce them to sell at a low price. To propose to pay for the property out of the company's funds would have opened the eyes of the Handley party to the nature of the transaction, if anything could produce that result. Hence the necessity for some pretence that the money

was not then in the command of the parties, and that, like the property, it was beset with dangers of which no man could then form a just estimate. However this may be, there was no understanding that this fund should be used in the purchase of the property, nor was there any agreement as to how the money should be raised for that purpose. As the result of the several interviews between Bissell and Foss on the subject of the purchase, it may be said that they were united in a purpose to get the Handley interest for partnership account, if it could be obtained at a cost of \$30,000 or less, but nothing was done towards raising the money. With this end in view negotiations took place with members of the Handley party, but nothing was accomplished until a few days later, when Hunter arrived at Leadville. Whether Hunter was then advised of what had taken place between Bissell and Foss and the Handley party, we are not informed; but upon his arrival a new arrangement was made between himself and Foss for obtaining the Handley interest, and apparently without the knowledge of Bissell. This was, in substance, that Hunter was to assume to sell to Foss his one-fourth interest in the property for \$15,000, in order to induce the Handley party to sell their one-fourth interest at the same price; and Hunter was to furnish the money for the Handley interest, and have two-thirds of that one-fourth, or two-twelfths of the whole,—the remainder of that one-fourth, or one-twelfth of the whole, to go to Foss. This trick was successful, and Foss was made the grantee of one-half interest in the property from Hunter, Handley, Robertson, and Rawlings, of which he a few days later reconveyed five-twelfths to Hunter. In this performance Handley, Robertson, and Rawlings received \$300 from Foss and \$14,700 from Hunter, who pretended to act in that matter as the agent of Foss, but really furnished the money himself. Before the transaction was fully completed by the payment of the money, and probably on the day the deed was made and before it was delivered, Bissell was advised of it, and at once asserted his right to an equal share in the property with Hunter and Foss, and expressed his willingness to pay his part of the purchase

money. That claim was denied, and the property having been sold and the proceeds deposited in the First National Bank of Denver, this suit was brought by Foss and Hunter against Bissell and the bank to determine the right to the fund. The bank was dissatisfied with its position in the suit, and filed its cross-bill to compel the others to interplead and adjust their differences and exonerate the bank from liability. Issue was joined on that bill, but the contestants have not acceded to its prayer otherwise than by the original pleadings. No question is now made, however, as to the form of the issue, and none will be considered by the court.

The matter in controversy is whether, upon what took place in the purchase of the Handley interest in the mines, Bissell is in equity to be regarded as a party thereto. Out of the relations of the parties as mining partners and tenants in common, or joint tenants of the three-fourths interest in the property, as well as from the conference and agreement between Foss and Bissell in respect to the purchase of the Handley interest, it is contended that a duty arose on the part of Foss towards his associates which was violated by him in making the purchase for Hunter and himself only. In other words, the position is assumed that relations of trust and confidence existed between the parties by which the acts of each, relating to the common property, should be controlled, and whatever was done by any of the owners should be taken to be for the advantage of all; or that Bissell was too confiding and was overreached by Foss, who, while claiming to act for all, sought to appropriate the purchase to Hunter and himself. Familiar principles are invoked in support of this position, and we shall best ascertain how far they may be applicable to the case by considering them with reference to the attitude of the parties in the several positions in which we find them in the record. And first let us put out of view their associations as mining partners and tenants in common, and consider whether, by the conference and agreement to purchase the property between Foss and Bissell, anything was established upon which the claim of the latter may rest. If two or more persons agree

amongst themselves to purchase property for their joint account, and the purchase is accordingly made by one or more of them on behalf of all, the liability of each to pay his share of the purchase money, and his right to an interest in the property, cannot be controverted. So, also, if two or more persons enter into a contract with another to purchase property, all matters being fully arranged in the agreement, the equal right of all vendees to proceed in the execution of the contract may be conceded. To illustrate that proposition, if the Handley party had agreed with Bissell, Foss, and Hunter to sell to them their interest in the mines, no one of the vendees could have taken the title to himself under that contract until default by the party excluded in some matter to which he was bound by the terms of the agreement. Again, if one take unto himself a title which he has purchased with the money of another, he shall be a trustee for the true owner, who may rightfully follow his fund, however it may be miscarried. But the record presents no one or more of these facts. There was, indeed, an agreement between Foss and Bissell to purchase the Handley interest, if that may be called an agreement which lacks the essential features of a price for the property and money to pay for it. But Handley, Robertson, and Rawlings were not parties to that agreement, and therefore it was not in itself an agreement to purchase, but to negotiate with them for the property. In that form it presents no feature which can affect the title to the property. At most it was an agreement between intending purchasers, which could give no right to either until it should be consummated in the purchase of the property. If we regard Foss and Bissell as agreeing to an agency in respect to the purchase of the property, the case is not different; for if one, who is clearly an agent of another to purchase property, repudiate the agency and act for himself, using his own funds, he cannot be declared a trustee for his principal. *Burden v. Sheridan*, 36 Iowa, 125. A different rule appears to be laid down in Story's Eq. Jur. § 1211a, but its limitation will be found in another section of the same volume—section 1201a.

An attempt was made, in argument at the bar, to put this case upon the footing of a numerous class in the books in which real property was granted upon a parol pledge from the grantee to make some disposition of it; as where a son has been granted an estate upon condition that he will support his father during his life-time, or where a devisee has promised the testator to divide the estate with another. In all such cases the trust may be established by parol, and the trust itself stands on the plainest principles of justice. But to point out the distinction between those cases and the case under consideration can hardly be necessary. Foss received nothing from Bissell on account of the purchase of the property, nor did he take the property with the understanding that he should admit Bissell to an interest to it. If he had received the property upon a pledge to hold it for Bissell, or to make some other disposition of it, his failure to do so would be a fraud upon the grantors as well as the beneficiary, of which either might complain, and the principle invoked would be applicable. But here there was nothing of that kind. The property was sold to Foss, who in fact received it, and Bissell comes to complain that he was not admitted to the purchase, as by his agreement with Foss he should have been. However he may have been misled by the conduct of Foss, he was not in fact a purchaser, and Foss did not receive the property to his use in any way, and therefore he acquired no interest in it.

If, now, we turn to the co-tenancy of the parties, we find in that relation nothing of weight respecting the question under consideration; for although tenants in common are not at liberty to assail the common title by which they all hold, they may deal with each other touching their respective interests. *Freeman's Co-tenancy*, 165. While Bissell, Foss, and Hunter, and the Handley party, were all bound to maintain the common title, each was at liberty to purchase from the other in the same manner as a stranger might purchase from any or all of them, *Alexander v. Kennedy*, 3 Grant's Cases, 380. It has never been claimed that a purchase by one co-tenant of the interest of another would enure to the

benefit of all who should retain their interest, and certainly there is nothing in the relations of such owners to support that doctrine.

The limitations to individual action on the part of the members of a partnership in respect to those matters which may or may not be within the scope of the partnership business are in many cases not easily defined. We know, however, that fidelity to the partnership is the highest duty of its members, and that no member can be allowed to turn the partnership concerns to his own account; and, whenever a member is found to be seeking a private advantage from partnership dealings, the courts are prompt to correct such an abuse of the confidence reposed in him by his associates. A familiar application of the principle is found in the cases cited by counsel, in which it is held that a partner cannot in his own name renew the lease of the premises used by the firm. In New York the doctrine was applied to a case in which the renewal did not begin until the copartnership had expired by its own limitation, and the reasons assigned by the court are entirely satisfactory. *Mitchell v. Reed*, 61 N. Y. 123. The position assumed in these cases is that the renewal is ancillary to the original lease, and so far connected with it that it shall be regarded as a part of it; and, as the original lease was owned by the firm, any attempt by a member to appropriate the renewal to his own use is a direct conversion of the property of the firm. In other words, the doctrine is that a member of a firm shall not be permitted to take unto himself the property of the firm, and the renewal of the lease whereof the firm holds the original is such property, and therefore it is protected for the use of the firm. To invoke the principle, however, it is obviously necessary to show that the malversation was of the partnership funds or effects, for if it be otherwise no member of the partnership can complain.

And this brings us to inquire, what right or interest of the copartnership of which he was a member was used or asserted by Foss in making the purchase of his associates' interest in the mines? Is it true that in a mining partnership the firm

has a right of pre-emption as to the interests of retiring partners in the mines? The answer is not doubtful. Where the partnership is formed expressly to work mines, and the mines are held by lease, the lease and renewal of it is, as the courts have held, partnership property. But, in the case at bar, the partnership arose out of a community of ownership in the mines, and the parties were, in a very large sense, involuntary associates. They came together upon the ground that they were tenants in common of the mines, and not upon any agreement to engage in the business of mining. Indeed, they had no agreement whatever respecting their joint operations; but they stood solely on their ownership of the property, in consideration of which they united for the purpose of working it. They were partners in the working, but not in the ownership, of the mines, and their firm was a thing of the hour, without hope of existence. In that kind of association it cannot be said that there is in the collective body a right to acquire new interests which its members are bound to respect. The object of the partnership was to take out ore, and in all things directed to that end each member owed allegiance to the company. Beyond that they were entirely free to act touching their interest in the mines, as well as other individual property. Each member held his interest in the mines in his own right, with power to dispose of it as he should think proper, and each was free to deal with his associate or with a stranger in respect to such interest. So, also, each member was at liberty to buy from his associates, and thus enlarge his interest in the whole property without reference to the partnership relation. On the whole case no reason can be found for saying that the purchase of the Handley interest enured to the benefit of Bissell, or that he had any share in it. If, in making it, Foss violated his promise to Bissell, in that there was moral wrong, and possibly there may be some remedy for the breach. But it cannot be said that by such promise only Bissell, who furnished no part of the purchase money, acquired an interest in the mines.

The money will be awarded to Foss and Hunter.

FAXON *v.* BARNARD and others.

(Circuit Court, D. Colorado, November 4, 1880.)

1. **MINING CLAIMS—CERTIFICATE OF LOCATION—RECORDING—COLORADO** REV. ST. 629.—An act of the assembly of the state of Colorado (Rev. St. 629) requires that the certificate of the location of a mining claim must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode. *Held*, that failure to record the certificate within the prescribed time would not render the same invalid, provided all things had been done as the act required, before any other and better right to the same ground had been perfected.
2. **SAME—LOCATION—PRIORITY.**—Therefore, when the Ontario lode was discovered on the public land, February 11, 1878, and the location completed in July of the same year; and the Green Mountain lode was discovered in August, 1877, and the location completed by filing for record a certificate of location in March, 1878; and these two locations partly overlapped each other,—it was *held* that the claim of the Green Mountain lode would prevail over the Ontario lode upon the question of priority of discovery and location.
3. **SAME—DESCRIPTION—REV. ST. § 2324—COLORADO REV. ST. 630.**—Section 2324 of the Revised Statutes requires the description of a mining claim to refer to some natural object or permanent monument from which the claim may be identified; and the Revised Statutes of Colorado (630) declare that the certificate of location shall give "such description as shall identify the claim with reasonable certainty." *Held*, under these statutory provisions, that a certificate which described a claim as "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain, * * * staked and marked as the law directs," was void for uncertainty of description.
4. **SAME—LOCATION—POSSESSION.**—A location cannot be extended over a senior discovery in the actual possession of another.
5. **SAME—SAME—SAME—PRESUMPTION—INJUNCTION.**—It will be presumed, upon a preliminary motion for an injunction, that such possession continued at the time of a junior location, in the absence of proof to the contrary.

Motion for Temporary Injunction.

G. G. White, for plaintiff.

Markham & Patterson and Thomas & Campbell, for defendants.

HALLETT, D. J. Plaintiff claims the Ontario lode as having been discovered by George A. Gibson and others, on the public land, February 11, 1878, and the location completed

in July of the same year. Defendants claim the Green Mountain lode as having been discovered by Benjamin Barnard in August, 1877, and the location completed by filing for record a certificate of location in March, 1878. These are rival locations, overlapping each other at the north end of the first and the south end of the second to the extent of 2 17-100 acres, which is the ground in controversy in this suit. A question common to both claims is whether a certificate of location must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode, as required by the act of assembly of 1874. Rev. St. 629. In terms, the act requires the certificate to be filed within that time; and, to secure the claim from the date of discovery against intervening claimants seeking to locate the same ground, it would seem to be necessary to comply with its provisions. But no reason is perceived for saying that the certificate shall be invalid if not filed within the time fixed by law. The design of the law clearly is to give the discoverer time for doing the acts necessary to a proper location. He may sink his discovery shaft within 60 days; he may put up his discovery notice, and his boundary stakes, and record his certificate of location within three months; failing in this he shall have no right as against one who has been more diligent in fulfilling the statute, although later in point of time. But when all things have been done as the act requires, before any other and better right to the same ground has been perfected, it seems to be just and entirely consistent with the statute to recognize the location as having been properly made.

Applying this rule in the present case, and accepting the averments of the parties respecting their locations as true, we find that, although each overstepped the statute, they may have precedence according to the dates of discovery. Beginning in February, 1878, plaintiff's grantors completed their location in July of that year. It is indeed stated in some affidavits in support of the bill that the Ontario lode was discovered in the autumn of 1877. But we cannot allow the plaintiff to go aside from or beyond the allegations of his

bill, and as he has averred that the lode was discovered in February, 1878, that will be accepted as the true date. Beginning in August, 1877, defendants completed their location in March, 1878, at which time plaintiff's grantors had not secured any right to the ground in controversy, as they had not then done all that was required to complete their location. If, then, the matters in issue were to be determined upon the question of priority of discovery and location, defendants would prevail. There is, however, another objection to defendants' certificate of location, that it does not refer to a natural object or permanent monument from which the claim may be identified. We are not asked to consider what may be a natural object or permanent monument to which reference may be made, or whether the language of the certificate in making such reference is sufficient under the law, for there is not in the certificate anything whatever as to any natural object or monument. It is said that the claim is "situated on the north side of Iowa gulch, about timber line, on the west side of Bald mountain. Said claim is staked and marked as the law directs." It is utterly impossible to find in this language any reference to a natural object or permanent monument defining the location, and the only question is as to the effect of the omission. The act of congress requires such reference to be made in the description of the claim, (Rev. St. § 2324,) and the state legislature has declared that the certificate shall give "such description as shall identify the claim with reasonable certainty." Rev. St. Col. 630. Compliance with the act of congress would fulfil all that is required by the state, and it may be said that the acts are in perfect harmony. But, if that were otherwise, there is no doubt as to authority of congress nor as to the purpose of the law in requiring that the claim shall be definitely described.

The government gives its lands to those citizens who may discover precious metal ores therein, upon the condition that they will define the subject of the grant with such certainty as may be necessary to prevent mistakes on the part of the government, and on the part of other citizens who may be

asking the like bounty. This is reasonable, and necessary to justly administer the law, and therefore it must be said that without such description a certificate of location is void. On that ground the original certificate of defendants' grantor will be rejected, and as the relocation was posterior to plaintiff's it cannot prevail against the latter. It remains to consider what would be the effect of actual possession by defendants or their grantors at the time the Ontario lode was located; for it appears that defendants' discovery shaft is in the ground in controversy, and they aver that they have been in possession since the lode was first opened. That they have not worked there constantly, may be inferred from what has been done; for, as the shaft is now only 50 feet deep, it is difficult to believe that three years and more have been occupied in sinking it. But defendants say that they have been on the ground constantly, and plaintiff asserts that they have never been there at all. In this conflict and imperfect statement of testimony it is impossible, on a preliminary motion of this kind, to ascertain the fact, and we resort to some general rules which should control.

Plaintiff's position is and must be that the lode was discovered by his grantors 600 or 700 feet from the ground in controversy, extends from thence to the point occupied by defendants, and that defendants are on the same lode. Assuming that to be correct, the question is whether defendants or their grantors were in actual possession at the time plaintiff's location was made. That they were on the ground before that time is shown by testimony which is not contradicted, and the burden is upon the plaintiff to show that they were not there at the time of his location; for if they were then in actual possession, having uncovered the lode, plaintiff's grantor, claiming by subsequent discovery, could not oust them so long as they saw fit to remain there. As to the ground actually held by them, although if they failed to locate under the law they could not claim more, no one by junior discovery could assert a superior title. Plaintiff's location may be valid up to the very point occupied by defendants' grantors, but it must be said that a location cannot be extended over

a senior discovery in the actual possession of another. And so the evidence tending to prove that defendants or their grantors may have been in possession of the shaft in controversy at the time of plaintiff's location, and plaintiff having failed to meet that evidence successfully, the motion for injunction will be denied. All assumptions of fact have of course been made on the proofs as they now stand. At the hearing, if the facts shall appear to be different, the view now expressed may be modified.

ORMSBY v. U. P. R. Co.

(Circuit Court, D. Colorado. November 17, 1880.)

1. RAILROAD—FREIGHT—TRANSPORTATION.—It is the duty of a railroad company engaged as a common carrier, when they receive freight to be transported, to carry it without unnecessary delay.
2. SAME—SAME—SAME.—A delay of 24 hours at a station on the way is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient.
3. SAME—SAME—SAME.—Such delay will not be excused by the fact that the railroad company needed its rolling stock for the purpose of carrying passengers.
4. SAME—CONTRACT—NEGLIGENCE.—It is settled, by repeated decisions of the supreme court of the United States, that a common carrier cannot relieve himself from responsibility for his own negligence, or the negligence of his employees, by any contract that he may enter into with the shipper.
5. SAME—SAME—SAME.—A common carrier may, however, enter into stipulations which do not relieve him in any degree from his responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing.
6. SAME—SAME—SAME.—A contract, therefore, is void in so far as it assumes to say that a railroad company shall not be liable on account of any delay in the transportation of stock.
7. SAME—SAME—SAME.—Such contract is also void in so far as it requires the shipper to give notice of his claim for damages before he unloads the stock.

Ormsby v. Union Pacific Ry. Co., ante, 170, affirmed.

8. **SAME—SAME.**—Such contract is valid, however, in so far as it requires that the shipper shall go with the stock and take charge of it, shall take and prepare the car for the use of the stock, and shall see to the loading and unloading of the same.
9. **SAME—SAME—NOTICE.**—A railroad company cannot exempt itself from any of its obligations as a common carrier by mere notice, or by printing which is appended to or indorsed upon the contract which is executed, but must do it, in so far as it is lawful to do it at all, by a stipulation in the body of the instrument, to which the shipper assents by his signature.

Railroad Co. v. Manuf'g Co. 16 Wall. 323, 329.

C. W. Wright, for plaintiff.

J. P. Usher and *H. M. & W. Teller*, for defendant.

MCCRARY, C. J., (*charging jury*.) This is a suit in which the plaintiff claims to recover damages from the defendant, the Union Pacific Railway Company, on the ground of negligence in the transportation of a car load of horses.

The plaintiff, in order to recover, must establish two propositions of fact, and of those propositions you are the judges: *First*, that the railroad company was negligent in the matter of delay in transporting plaintiff's horses; *second*, that the result of that negligence was the damage and injury complained of. I will speak to you first only with regard to the plaintiff's case. Presently I will call your attention to the several defences that have been set up by the defendant. You will then in the first place consider whether the plaintiff has made out, *prima facie*, a case upon which he is entitled to recover if the defence is not established—whether the railroad company was guilty of negligence in the matter of delay; because there is no allegation that there was any negligence except in the delay of 24 hours at the station of Brookville, between this and Kansas City. It is the duty of a railroad company, engaged as a common carrier, when they receive freight to be transported, to carry it without unnecessary delay. A delay of 24 hours at a station on the way is an unnecessary delay, unless it is explained and excused by something which the law recognizes as sufficient. The excuse that the company needed its rolling stock for the purpose of carrying passengers is not a sufficient excuse. The duty of

the company is to be prepared to execute its contracts, both to carry passengers and to carry freight; it cannot excuse itself for a failure to do the one upon the ground that it was bound to do the other, and that it was not able to do both. Therefore, if there was nothing in the case except the fact of a delay of 24 hours at this station, and if you should find that that delay was the cause of the injury of which the plaintiff complains, he would be entitled to recover. But it is incumbent upon the plaintiff to show by the preponderance of testimony that the damage to his stock was caused by that delay of 24 hours, and that is the next question for your consideration. You are to consider that question carefully upon the testimony that has been submitted to you, and it is for you to decide whether, in the case of the horses that died, their death was caused by this delay; and, as to the others, whether their sickness and the damage to them was the result of the same cause. In considering this question you will look into the evidence which has been offered before you, tending to show that the injury might have resulted from some other cause; and if you find that it did result from other cause, or, in other words, if you do not find the evidence sufficient to show that it resulted from this delay, you cannot find a verdict for the plaintiff; as, for example, you must consider the condition of the stock when it was shipped at Kansas City, and its condition when it was shipped in Kentucky. If you find that there was anything the matter with the stock, or any of it, before it started from Louisville, that is a fact to be considered, and upon the testimony it is for you to say whether this delay of 24 hours resulted in the death of the two horses, and in the sickness and injury of the others complained of. If you find that the delay was the cause of the injury to the stock, then your verdict will be for the plaintiff, unless you find for the defendant on some of the matters that are alleged by way of defence.

In considering, however, the first question, (whether the damage resulted from this delay,) you are to consider not only the condition of the stock when it was shipped at Louisville, and when it was reshipped at Kansas City, but you are

to consider the manner of the shipment that has been testified to before you—the fact that the horses were put in stalls, that they were crosswise of the car, and that there were 12 of them on the car, and you are to judge whether that manner of shipment would or would not have resulted in this sickness and death and injury of the horses, independently of the delay of 24 hours at Brookville. If you conclude that under all the circumstances the horses would have come through safely, and none of them died, and none of them suffered injury but for that delay, then the plaintiff has made out a *prima facie* case. But if you conclude that even if the horses had not been stopped at Brookville these two would have died, and the others would have been injured and sick, just as they were, then the plaintiff has not made a case, and that is the end of it. But, if upon these questions you find for the plaintiff, you will proceed to consider some of the matters alleged by way of defence; and the only matter that I think I need call your attention to as requiring your consideration, is the allegation of negligence on the part of the plaintiff himself. I say to you, as matter of law, that if the plaintiff was negligent, and if his negligence materially contributed to the injury which he has sustained, then he cannot recover. And in considering this question you will look into the evidence upon the points that I have already called your attention to. As, for example, you will inquire whether it was negligence in him to ship horses in the manner in which he shipped; whether he acted with reasonable and ordinary prudence in that respect, and, if he did not, whether that negligence materially contributed to the results that followed. You will consider whether it was negligence in him to ship the horses in the condition they were in when they left Kansas City; whether prudence required him to delay there, and, under all the circumstances, whether he was negligent in that respect. It is also alleged that he had the option of unloading the horses at Brookville, and that he neglected to avail himself of it. Upon this question there is a conflict of testimony. It is for you to decide what the facts are. If he knew that his train was to remain at Brookville a number of hours, or a day,

and if he had the opportunity to unload the stock and give them rest, and neglected to do it, then it is for you to consider whether that was negligence, and, if so, whether that negligence contributed to the injury which he has sustained; but if he expected that the train would start every half hour, and had reason, from the representations made to him, to expect that, then it is for you to say whether he was, under those circumstances, called upon to attempt to unload his stock.

The defendants have set out, by way of defence, a contract under which they allege that the shipment of this stock was made. The execution of this contract is admitted by the pleadings, and therefore it is before us for consideration. It presents a question which is not without difficulty as a matter of law; at least, it would not be without difficulty in some courts of the country, because there is great conflict of opinion among the courts as to how far a common carrier may release himself from responsibility by a special contract with the shipper. In the courts of the United States, however, the law is well settled, and I am therefore without difficulty in instructing you upon this point. It is settled, by repeated decisions of the supreme court of the United States, that a common carrier cannot relieve himself from responsibility for his own negligence, or the negligence of his employes, by any contract that he may enter into with the shipper. He may, however, enter into stipulations which do not relieve him in any degree from his responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing.

Now, this contract which is before you, in so far as it assumes to say that the railroad company shall not be liable on account of any delay in the transportation of this stock, is void. It is also void according to the decision rendered by Judge Hallett upon demurrer, in so far as it requires the shipper to give notice of his claim before he unloads his stock. That has been settled by that ruling, in which I concur. In so far as it provides that this plaintiff shall go with the stock and take charge of it, shall take a car and prepare the car for

the use of the stock, and shall see to loading and unloading, and all those particulars, I think it is a valid contract; but, as to these particulars, there is no particular conflict in this case. There is appended to this contract a printed statement, which is headed "Rules and regulations for the transportation of live stock," and in that statement there is a provision that in case damages occur in the transportation of live stock, for which the company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed \$200 for a stallion; \$100 for a horse; mule, \$65; cattle, \$50, and other animals, \$20. And also another provision, that blooded animals, or animals deemed especially valuable, will be carried only on special contract, and agents are not allowed to receive and ship such animals until a proper contract is made between the owner or consignee and the general freight agent. That, gentlemen, is not in the contract which the plaintiff signed. It is in a print which is on the same sheet of paper with the contract. It has been held by the supreme court of the United States that the shipper is only bound by the stipulation contained in the contract itself; or, in other words, that the railway company that proposes to exempt itself from any of its obligations as a common carrier, cannot do it by mere notice, or by printing which is appended to or indorsed upon the contract which is executed, but must do it, in so far as it is lawful to do it at all, by a stipulation in the body of the instrument, to which the shipper assents by his signature. Upon this subject I charge you in the language of the supreme court in the case of the *R. Co. v. Manuf'g Co.*, reported in 16 Wallace's Reports, 328, 329, as follows: "Whether a carrier, when charged upon his common-law responsibility, can discharge himself from it by special contract, assented to by the owner, is not an open question in this court since the cases of *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, and *York Company v. Central Railroad*, 3 Wall. 107. In both these cases the right of the carrier to restrict or diminish his liability by special contract, which does not cover losses by negligence or misconduct, received the sanc-

tion of this court. In the former case the effect of a general notice by the carrier seeking to extinguish his peculiar liability was also considered; and, although the remarks of the judge on the point were not necessary to the decision of the case, they furnish a correct exposition of the law on this much-controverted subject. In speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: It by no means follows that this can be done by an act of his own. The carrier is in the exercise of a sort of public office, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all responsibilities incident to his employment, and is liable to an action in case of refusal. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier, as it is that he assented to their qualification. The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.' " And there is more in the same opinion to the same effect, which it is not necessary for me to read.

I say to you, gentlemen, so far as anything contained in the rules and regulations for the transportation of live stock, printed at the head of this contract, is concerned, it is not a part of the contract with this plaintiff.

Upon the question of damages in this case, in the event you shall find for the plaintiff, (of course, if you find that the delay did not cause the injury, that is the end of the case, and you find for the defendant. If you find that the plaintiff himself was negligent, that his negligence contributed materially to the loss which he has sustained, that is the end of the case;) but, if upon these questions you find for plaintiff, you will then consider the question of damages. In this part of the case you are the judges, but you must consider it carefully.

There is no subject coming before courts upon which there is so much extravagant testimony; it is very largely a question of opinion. You must consider all the evidence and all the circumstances, and arrive at a just and reasonable determination. It is not what a man might have made if the horse had not died, by using him as a racer upon the track, that is the test of his damages. The rule is this: that he is entitled to recover the reasonable market value in cash at the place where the loss occurred; that is to say, what the two horses that died could reasonably have been sold for in this market at that time in cash. Of course, such a question is always subject to more or less uncertainty; one man will estimate it at more than another, and the jury is simply to make use of their common sense, and apply the testimony and all the circumstances, and arrive at a fair and just estimate.

As to the horses that did not die, the damages would be simply the actual loss—the actual damage which the plaintiff sustained by reason of the injuries, the sickness which resulted from the negligence, if there was negligence, of the defendant. In ascertaining the value of these animals you are to look into all the circumstances; to consider the age of the horses that died. You are to consider their breeding, of course, the purposes for which they might be used, and everything that goes into the question of their market value in this market. As to this old horse, there is a claim here, and some evidence tending to show, that he was diseased before he left Kentucky, and that is a subject for your consideration. If that be true, it of course affects the value of the animal. It is for you to say whether that is true or not.

I have not gone over the suggestions of counsel, but I think that I have covered everything that is necessary. If there is any suggestion to be made I will hear it.

Verdict for plaintiff for \$750.

UNITED STATES *v.* PINGS.

(*District Court, S. D. New York. November 9, 1880.*)

1. DEPOSITION—COMMISSION—RULE OF COURT—FORMAL DEFECT.—A commission for the taking of a deposition will not be set aside, where it appears to have been properly executed, although the form of instructions to the commissioner, annexed to the deposition, was not signed by the clerk or the defendant's counsel, as required by a rule of the court which issued the commission.
2. SAME—PRACTICE—REV. ST. § 866.—The mode of executing such commission, when issued by a federal court, is not governed by a state statute, but by section 866 of the Revised Statutes.
3. SAME—REV. ST. § 866—"ACCORDING TO COMMON USAGE."—A deposition is not taken "according to common usage," within the meaning of section 866 of the Revised Statutes, if one of the parties to the action writes down the answers for the commissioner, at the request of the latter, in the absence of the other party to the suit, although it does not appear that any injury was thereby sustained.

Motion to Suppress a Deposition.

Melville Brown, for motion.

Samuel B. Clarke, Ass't Dist. Att'y, *contra*.

CHOATE, D. J. This is a motion to suppress a deposition taken under a commission issued to the consul of the United States at Breslau, Germany, for the examination of witnesses upon written interrogatories. One objection taken to the deposition is that the form of instructions to the commissioner annexed to the commission were not signed by the clerk or by defendant's counsel, as required by rule 112 of this court. This is a formal defect only, and does not, I think, justify the setting aside of the commission, if, in fact, it appears to have been properly executed. Objection is also made that the answers of the witness to the interrogatories were written down by one of the counsel for the plaintiff, who happened to be in Europe at the time and attended upon the taking of this and other testimony. The defendants were not represented before the consul upon the taking of the deposition.

It is insisted, on the part of the defendant, that the provisions of the New York Code, § 901, which require the person executing a commission to take testimony to reduce the exam-

ination to writing himself, or cause it to be reduced to writing by a disinterested party, are made applicable to depositions taken under a commission from a court of the United States. I think, however, that the mode of executing commissions out of this court is governed, not by the state statute, but by the 866th section of the Revised Statutes of the United States, which provides that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage." This matter being expressly provided for by act of Congress, the state practice relating to the same matter is not adopted by Revised Statutes, § 914. *Beardsley v. Little*, 14 Blatchf. 102.

The question, therefore, is whether, in case of a deposition taken under a commission "according to common usage," it is a fatal objection that the attorney for one of the parties to the action writes down the answers for the commissioner, the other party to the suit not being represented. I think such a practice, if allowed, might lead to great abuses. A very slight turn of expression given to an answer, and such as might escape the notice of the witness or the magistrate, would, in some cases, materially alter the sense. Nor would it be possible, ordinarily, for the party not represented at the taking of the testimony to show that in the particular case he was injured or prejudiced. The statute of New York which forbids the practice is certainly wise, and calculated to protect the administration of the law, in this particular, against abuses.

The statutes of some of the states required the witness to be examined by the commissioner separately and apart from all other persons. In this case it is not claimed that there is any evidence that the defendant was in fact prejudiced or injured by what was done, and it appears by affidavit that the testimony was taken as it was at the special request of the consul; that the consul, who was present all the time, was old and feeble, and not well able to write the answers down himself. I think the practice, however, must be condemned as improper and dangerous, without regard to

what may be shown in the particular case, and on this ground the deposition must be suppressed, although there is no suggestion of intended impropriety or actual prejudice to the defendant in this case. The learned counsel for the plaintiff has cited two cases, in which this objection appears not to have been sustained, as authority for the proposition that a commission so executed is executed "according to common usage," as that expression was understood at the time of the passage of the judiciary act of 1789, from which Rev. St. § 866, was taken. 1 St. 85, § 30; *Nichols v. White*, 1 Cr. C. C. 58; *Atkinson v. Glenn*, 4 Cr. C. C. 134. These precedents may account for, and may have been supposed to justify, the course that was taken in this case, as they are decisions by a court of undoubted authority.

But in neither of these cases does it certainly appear that the party making the objection was not represented by his counsel upon the taking of the testimony. If he was, the objection might well have been considered waived, if not taken at the time. If, however, it was otherwise, and the cases were like the present, yet a practice, which at one time may appear to the courts harmless, may, at a different period and in a different state of things, be seen to involve such possibility of abuse that it should not be permitted. The large increase, in modern times, in the number of attorneys, and their less intimate relations with the courts, have effected such changes as may well alter rules of practice in a matter such as this; and, of course, if the practice is permitted in the case of any attorney, it must be permitted in the case of all. And, while the term "according to common usage" is to be construed as referring to what was, at the time the act of 1789 was passed, understood to be "common usage," yet, in a matter affecting the purity of the administration of justice, the courts are at liberty, from time to time, so to control the execution of their own processes and mandates as to repress or prevent a practice which they shall see is capable of introducing abuses. This is, and always was, "according to common usage;" and an application to suppress a deposi-

tion on such a ground is one addressed to the sound discretion of the court, and when it is made, as here, before the trial, the granting of the motion may be with leave to issue a new commission for re-examination of the witnesses.

o Motion granted.

HATFIELD v. MOLLER and others.

(Circuit Court, D. New Jersey. November 30, 1880.)

1. BANKRUPTCY — ATTACHMENT. — An attachment levied within four months before the commencement of proceedings in bankruptcy is dissolved, *ipso facto*, by operation of such proceedings.

In re Scrafford, 15 N. B. R. 104.

2. SAME — SAME. — A bill in the nature of a creditor's bill, praying that certain conveyances of real estate may be declared void, will therefore be dismissed with costs, when filed by a purchaser of the property under such writ of attachment.

In Equity. On Bill and Plea.

NIXON, D. J. Moses Taylor & Co., of New York, claiming to be creditors of William Moller & Son, of the same place, on the sixteenth of September, 1875, caused a writ of foreign attachment to be issued out of the circuit court of the county of Warren, state of New Jersey, returnable October 5, 1875, and placed it in the hands of the sheriff of said county for execution, who, by virtue of the same, levied upon sundry lots and tracts of land situate at Hackettstown, as the property of William Moller, one of the defendants.

Pending these proceedings, and within a few weeks after the return of the writ, to wit, on the twenty-eighth of October, 1875, a petition in bankruptcy was filed against William Moller, George H. Moller, and William F. Moller, as co-partners, and against William Moller individually, and they were adjudged bankrupts on the twentieth of November following. William A. Booth was duly appointed their assignee on the thirteenth of December, 1875, to whom an assignment

was regularly made of all the bankrupts' partnership and individual property.

Notwithstanding these bankruptcy proceedings, the proceedings under the attachment were continued in the state court, by the appointment of an auditor, the entry of the judgment in favor of the attaching creditors, the sale of the real estate taken under the writ, on the twenty-eighth of December, 1876, and the execution of a deed by the auditor to the purchaser, two days afterwards.

The purchaser then filed a bill in the court of chancery of New Jersey, in the nature of a creditor's bill, alleging that William Moller, one of the defendants in attachment, previous to the issue of the writ, had made and executed two several deeds of conveyance to his two daughters, Elizabeth Moller and Sarah M. Moller, purporting to convey the said real estate; that these deeds were voluntary, without valuable consideration, and were, as was expressed upon their face, "in consideration of natural love and affection," and were fraudulent and void against creditors, and praying that they might be decreed illegal, null and void against the complainant as purchaser.

To this bill the defendants put in a plea, setting up the proceedings in bankruptcy in bar of the complainant's title.

The case has been brought into this court by virtue of the removal act, and has been heard upon bill and plea. It must be determined by ascertaining the effect which the bankruptcy proceedings had upon the pending attachment. The writ was issued within four months next preceding the filing the petition; was the attachment, therefore, dissolved by the adjudication? If so, the state court had no jurisdiction thereafter to enter a judgment or make an order for the sale of the property, and the complainant's title is void. Or, was it necessary for the assignee, after his appointment, to take some affirmative steps in order to divest the lien of the attachment? None such were taken, and unless the attachment was dissolved by operation of law, after the filing the petition in bankruptcy, and the adjudication thereon, the plea is bad and must be overruled.

The decision of these questions depends upon the construction of the provisions of section 5044 of the Revised Statutes of the United States. That section provides that, "as soon as the assignee is appointed and qualified, the judge, * * * by an instrument under his hand, shall assign and convey to him all the estate, real and personal, of the bankrupt, and such assignment shall relate back to the commencement of proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate in the assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings."

Much controversy has arisen as to the true construction of these provisions, but the weight of authority undoubtedly is that after an adjudication in bankruptcy all attachments become invalid, and their lien is divested by operation of law, unless more than four months shall have intervened between the issuing of the writ and the filing of the petition. See *In re Ellis*, 1 N. B. R. 555; *In re Preston*, 6 N. B. R. 545; *Zeiber v. Hill*, 8 N. B. R. 240.

Thus, in *Miller v. O'Brien*, 9 Blatchf. 271, Judge Woodruff says: "The statute, (§ 5044,) in the most explicit terms, declares the attachment dissolved. In like explicit terms it declares that the assignment to the assignee shall relate back to the commencement of the proceedings in bankruptcy, and that the title to all the bankrupt's estate shall vest in the assignee."

In re Scrafford, 15 N. B. R. 104, Judge Dillon asserts that "all attachments levied within four months before the commencement of the proceedings in bankruptcy are dissolved, *ipso facto*, by operation of such proceedings."

In *Bracken v. Johnston*, 15 N. B. R. 106, Justice Miller, in discussing the meaning of the section of the bankrupt law now under consideration, says: "The purpose of the act was to put a creditor, who undertook to secure a lien by attachment, in precisely the same condition as one who took a preference or lien by consent of the debtor. In both cases the

creditor proceeded at his own hazard. If the debtor escaped the bankruptcy court for the prescribed time, the preference or lien remained valid. If he did not, it is *void absolutely*."

And the judgment of the supreme court in *Doe v. Childers*, 21 Wall. 643, is strongly in the same direction, although it be an implication, rather than a direct utterance. The decision there was that an attachment, laid more than four months previously to the proceedings in bankruptcy begun, continued a valid lien, and was not dissolved by the transfer of the bankrupt estate to the assignee.

But the court, in reaching that conclusion, say: "Under the fourteenth section (§ 5044 of Rev. St.) of the bankrupt act, the title *pendente lite* is transferred by operation of law from the bankrupt to the assignee in bankruptcy. The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences: *First*, it relates back to the commencement of the bankruptcy proceeding; *secondly*, the register's conveyance dissolves any attachment that has been made within four months previous to the commencement of the bankrupt proceedings."

The title of the complainant failing, and the law requiring him to stand upon the strength of his own title, rather than the weakness of his adversaries, the bill of complaint must be dismissed, with costs.

GIANT POWDER COMPANY v. CALIFORNIA VIGORIT POWDER
COMPANY and others.

(Circuit Court, D. California. —, 1880.)

1. RE-ISSUE—REV. ST. § 4916.—Section 4916 of the Revised Statutes only authorizes a re-issue when, from an unintentional error in the description of the invention, the patent is invalid or inoperative, or when the claim of the patentee exceeds his invention.
2. SAME—COMMISSIONER OF PATENTS—JURISDICTION.—The power to accept a surrender and issue new letters is vested exclusively in the commissioner of patents, and his decision in such cases is not open to collateral attack in a suit for the infringement of re-issued letters.

3. SAME—SAME—SAME.—The commissioner of patents, however, is an officer of limited authority, whose jurisdiction is restricted to the particular cases mentioned in the statute, and, therefore, whenever it is apparent upon inspection of the patents that he has acted without authority, or has exceeded it, his judgment must necessarily be regarded as invalid.
4. SAME—SAME—SAME.—*Held*, therefore, where an original patent covered a compound of nitro-glycerine with inexplusive, porous, absorbent substances, and the re-issued patent covered a compound of nitro-glycerine with all porous absorbents, whether explosive or inexplusive, that there was no case presented upon which the powers of the commissioner of patents could be invoked, and that the re-issue was therefore void.
Russell v. Dodge, 93 U. S. 463.
5. PATENT—TERMS—CONSTRUCTION.—Although the court cannot look outside of a patent for the explanation of terms in it which are not technical and are free from ambiguity, yet it can examine into the history of the invention patented so as to be able to read the specifications in the light of the inventor's knowledge.
6. SAME—SAME—SAME.—*Held*, therefore, in view of the history of this case, and reading the specifications of the patent in that light, that it is clear that the inventor used the term "inexplusive" in its natural and ordinary sense, and that the attempt to limit that meaning is an afterthought of the assignees, desiring to bring within the reach of the patent compounds in no respect within the inventor's contemplation.

McAllister & Bergin, Alfred Rix, and Causten Browne, for complainant.

Hammond & Wright, for defendants.

FIELD, C. J. The complainant is the holder of a patent bearing date March 17, 1874, for an alleged new explosive compound known as dynamite or giant powder. For some time since its issue the defendants have been engaged in making, selling, and using an explosive compound averred to be substantially the same as the compound described in the patent. This suit is brought for the alleged infringement, with a prayer that the defendants be required to account and pay over to the complainant the income and profits obtained by them from this violation of its rights, and be restrained from further infringement. The compound patented is claimed to be the invention of Alfred Noble, a distinguished engineer of Sweden. His invention, whatever may have been its extent, was assigned to one Bandmann, in April, 1868, and in May
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following a patent for the same was issued to him for the term of 17 years. Soon afterwards Bandmann assigned his interest to the complainant, the Giant Powder Company, a corporation created under the laws of California; and in October, 1873, this company surrendered the patent and obtained re-issued letters for the residue of the term. In March, 1874, this re-issue was also surrendered, and new letters patent were issued, for the infringement of which the present suit is brought. The bill alleges that the surrender of the original letters, the first re-issue, its surrender, and the second re-issue were each made for "good and lawful cause;" but it does not specify what that cause was. The allegation will, however, be taken to be that the cause was one for which the statute authorized a surrender and a re-issue. The bill also alleges that each re-issue was for the same invention described in the original patent.

The answer denies both of these allegations, and avers that the original letters and the first re-issue were not surrendered because they were invalid by reason of a defective and insufficient specification arising from inadvertence, accident, or mistake, without any fraudulent intention on the part of the patentees, and charges that they were surrendered upon false representations, with the intent to interpolate and obtain, in re-issued letters, claims and grants for more than was embraced by the invention of Nobel described in the original patent, and that the re-issued letters were not for the same invention, but for another and different one. And the defendants insist that for this and other reasons the re-issued letters are invalid.

On the argument the counsel of the complainant stated that the second re-issue was obtained to correct a clerical error in the description of the grantee, and that it does not differ in its specifications from the first re-issue, so that practically there is but one re-issue in the case. So treating the matter, the question presented to us at the outset relates to the validity of this re-issue.

The act of congress of 1870, embodied in the Revised Statutes, (under which the re-issue was granted,) provides that

"whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or in case of his death, or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent."

As thus seen, a re-issue can only be had when the original patent is inoperate or invalid from one of two causes—either by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new; and even then the patentee can only obtain a re-issue where the error has arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention.

As the power to accept a surrender and issue new letters is vested exclusively in the commissioner of patents, his decision in the matter is not open to collateral attack in a suit for the infringement of re-issued letters. His action, like that of all officers especially designated to perform a particular duty of a judicial character for the government, is presumed to be correct until impeached by regular proceedings to annul or modify it. He must judge, in the first instance, of the sufficiency of the original specification—whether the same is defective in any particular; whether such defect was the result of an unintentional error; and, if so, to what extent a new or additional specification should be allowed to describe correctly the invention claimed; and it is to be assumed in every case that he has done his duty. The decisions of the supreme court to this effect are numerous, and the doctrine is among the settled rules of patent law. But it does not preclude the

examination of the original and re-issued patents, to see whether or not they disclose on their face a case in which the commissioner had authority to act, or whether he has exceeded his authority in issuing letters for an invention different from that described in the original patent. If they disclose a case in which the commissioner had no jurisdiction to act, or a case in which by his determination he has exceeded his jurisdiction, the re-issued letters must fall. His determination can have no greater conclusiveness than that of the judgment of a regular judicial tribunal; and we all know that although such judgment cannot be collaterally attacked by showing that the evidence upon which the court acted was insufficient, that improper testimony was admitted, that the court erred in its rulings upon matters of law, or that the verdict of the jury was against the weight of evidence, yet the record of the judgment can in all cases be examined to see whether the court has jurisdiction of the subject-matter and of the person of the defendant; and, if such jurisdiction be wanting, the judgment is ineffectual for any purpose. So here, upon all matters outside of the patents which the commissioner was to hear, and upon the weight of which he was to determine, his judgment is conclusive in the present suit; but if the patents disclose a case in which he had no jurisdiction, or in which he exceeded it, his determination carries with it no efficacy.

This is general and universal law, although we find expressions in opinions that the only question left over for the consideration of the court, in a suit for infringement of re-issued letters, is, whether the new and the old patent are for the same invention. The expressions would be more accurate if they were; that seldom could any other question be raised, for seldom will it appear without the consideration of extrinsic evidence whether or not the original patent was invalid or inoperative from a defect of specifications. Suppose, for illustration, that the specifications in two patents, the original and the re-issued, were identical in their language—or, differing in phraseology, were identical in meaning—would it be pretended that, though their identity would be thus manifest on their face from a comparison of the two, and that the com-

missioner in granting the re-issue had accordingly acted in a case not warranted by the statute, it must be assumed that the re-issue was properly granted, and that the action of the commissioner could not therefore be questioned? The decisions support no such conclusion.

The commissioner is an officer of limited authority; and, whenever it is apparent upon inspection of the patents that he has acted without authority, or has exceeded it, his judgment must necessarily be regarded as invalid. His action must be restricted to the particular cases mentioned in the statute. That only authorizes a re-issue when, from an unintentional error in the description of the invention, the patent is invalid or inoperative, or when the claim of the patentee exceeds his invention. It is not sufficient that the patent does not cover all that the patentee could have claimed if his specifications had come up to his invention. If he has invented or discovered something beyond his original specifications and claim, his course is not to endeavor to cover it by a re-issue, but to seek a separate patent for it.

The statute authorizing a re-issue was intended to protect against accidents and mistakes, and it is only when thus restricted that it can be regarded as a beneficial statute. If a patentee does not embrace by his specifications and claim all that he might have done, and there has been no clear mistake, inadvertence, or accident in their preparation, the presumption of law is that he has abandoned to the use of the public everything outside of them, or at least has postponed any additional claim for further consideration.

In *Russell v. Dodge*, 93 U. S. 463, the supreme court, speaking of a re-issue under the law of 1836, which is similar to the law of 1870, under which the present re-issued letters were obtained, said: "A defective specification could be rendered more definite and certain so as to embrace the claim made, or the claim could be so modified as to correspond with the specification; but except under special circumstances, such as occurred in the case of *Lockwood v. Morey*, 8 Wall. 230, where the inventor was induced to limit his claim by the mistake of the commissioner of patents, this was the extent to

which the operation of the original patent could be changed by the re-issue. The object of the law was to enable patentees to remedy accidental mistakes, and the law was perverted when any other end was secured by the re-issue." See, also, *Railway v. Sayles*, 97 U. S. 563.

In the light of this decision, and of the views expressed upon the act of congress, there can be but one answer to the question presented as to the validity of the re-issue upon which this suit is founded. Looking at the original patent and the re-issued patent, and the specifications annexed to them, we find that the material difference between them is as to the extent of the invention. The original patent covers a compound of nitro-glycerine and any inexplusive porous absorbent which will take up the nitro-glycerine and render it safe for transportation, storage, and use, without loss of its explosive power. The re-issued patent enlarges the scope of the invention so as to embrace a compound of nitro-glycerine with any porous substance, explosive or inexplusive, and will be equally safe for use, transportation, or storage.

It is plain, from a comparison of the specifications of the two patents, that their difference is in their application—the one covering only a compound of nitro-glycerine with inexplusive, porous, absorbent substances; the other covering a compound of nitro-glycerine with all porous absorbents, whether explosive or inexplusive. We shall hereafter consider how far this changes the character of the invention. At present it is sufficient to say that it is manifest that if the re-issued patent, standing alone, would be valid and operative, the original patent, to the extent of its claim, would be valid and operative also; in other words, that there is no foundation for the pretence that the original patent was invalid or inoperative from any defect of description. Its range or scope was more limited than the re-issued patent—that is all. It was a valid and operative patent to the extent of its claim, and that covered the invention described. There was, therefore, no case presented upon which the powers of the commissioner could be invoked. There was no invalid or inoperative patent, from a defect of description, to be corrected by a re-

issue. The specifications annexed to the original patent were clear and sufficiently explicit for the compound composed of nitro-glycerine and the inexplosive, porous substance mentioned, and the claim was only for a composition of matter made of the ingredients in the manner and for the purposes described in them. There was, therefore, nothing to correct in a re-issue, according to the decision in *Russell v. Dodge*, 93 U. S. 463. The claim was as extensive as the invention specified, and there is no pretence that this was not sufficient to cover a compound of nitro-glycerine with inexplosive, porous absorbents.

The case might be rested here; but respect for the able and distinguished judges of the first and second circuits requires some notice of their decisions. They have held that the re-issued patent is valid, against a defence that it covers a different invention from that described in the original patent, and that the term "inexplosive," in the original specifications, is used only in a relative sense, as compared with nitro-glycerine, and not in an absolute sense, excluding the entire use of all explosive absorbents, whatever their degree of explosiveness. Their attention does not, however, appear to have been directed to the point, that if the original patent was valid and operative with the existing specifications, there was no case for a re-issue for the consideration of the commissioner. On the contrary, their opinions, like the argument of counsel in the case, go to show that the original patent was valid and operative, and that its specifications were sufficiently comprehensive to include explosive absorbents, if the resulting compound could be safely used, stored, and transported. If their positions be sound, there was no ground for a re-issue, and the new letters cannot be sustained.

But, independently of this consideration, we are not able to concur with the learned judges as to their interpretation of the term "inexplosive" in the original patent, and consequent judgment that the re-issued patent is for the same invention. While we cannot look outside of the patent for the explanation of terms in it which are not technical and are free from

ambiguity, we can examine into the history of the invention patented, so as to be able to read the specifications in the light of the inventor's knowledge. We can place ourselves in his position so as to see, as it were, with his eyes, and speak with his language. The natural signification of the term "inexplosive" would exclude explosive absorbents; and, where an attempt is made to qualify and limit this meaning, we are at liberty to inquire into the circumstances under which the term was used. It was held by the supreme court of California, in construing an agreement concerning the boundary line of mining claims, where the term "north" was used, that it was competent to show by the usage of the place that it had reference to the line indicated by the compass there, and not to a line due north and south, according to the true meridian. *Jenny Lind v. Bower*, 11 Cal. 194.

Now, reading the history of the labors of Alfred Nobel to utilize the explosive power of nitro-glycerine and render it safe to transport, handle, and use; the experiments he tried, first to explode the nitro-glycerine in mass, then, in consequence of the dangers attending its use, to prevent its explosion when handled; the patents he obtained in Europe; his experience in the use of gunpowder and other explosives with nitro-glycerine,—it is impossible to believe that he intended anything different from the natural meaning of the term he used. He knew well the danger attending the use of nitro-glycerine with explosive absorbents; and, in limiting his claim to its use with inexplosive absorbents, we must presume that he at that time intended to abandon all claim to compounds of a different character, or at least to leave such claim open for further consideration. If we read his own language, in an application made three years afterwards for a new patent for a compound with explosive absorbents, presented to the commissioner of patents by the complainant, and therefore adopted and approved by it, there can be but little doubt on the subject. Soon after the new patent was obtained the application for a re-issue was made, evidently that it might reach back to the date of the original patent and cover inven-

tions of other parties during the intermediate period, or that which had gone into public use.

We do not attach to the general language used by Nobel in the first patent, following the statement of the nature of his invention, the significance ascribed to it by counsel. We give it a different construction. The statement is that "the nature of the invention consists in forming out of two ingredients long known, viz., the explosive substance nitro-glycerine, and an inexplusive porous substance hereinafter specified, a composition which, without losing the great explosive power of nitro-glycerine, is very much altered as to its explosive and other properties, being far more safe and convenient for transportation, storage, and use than nitro-glycerine."

Following this statement is this language: "In general terms my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, and which at the same time is free from any quality which will decompose, destroy, or injure the nitro-glycerine or its explosiveness." The substance here mentioned as possessing a great absorbent capacity has reference not to any absorbent substance, but that which is specifically designated in the preceding statement of the ingredients of the compound, as if the inventor had said: "In general terms, my invention consists in mixing with nitro-glycerine a substance which possesses a very great absorbent capacity, which substance is porous and inexplusive, and is hereinafter specified." The inexplusive porous substances afterwards specified were certain kinds of silicious earth, or silicic acid, known under the general term of silicious marl, tripoli, rotten stone, and the like, the best of which was composed of the remains of *infusoria*.

This construction renders it unnecessary to give a forced meaning to the term "inexplusive," and is consistent with all the preceding and subsequent statements and conduct of the inventor as disclosed in the history of his invention. It nowhere appears that he had any knowledge or belief, when the first patent was issued, that the admixture of nitro-glycerine with explosive substances would produce a safety powder. That was a discovery which he did not make, or claim to have

made. So when in his specifications he mentions charcoal as an absorbent, he observes that it has the "defect of being itself a combustible material."

To our mind, looking at the history of the invention and reading the specifications of the patent in this light, it is clear that the inventor used the word "inexplosive" in its natural and ordinary sense, and that the attempt to limit that meaning is an afterthought of his assignees, desiring to bring within the reach of the patent compounds in no respect within his contemplation. In other words, the re-issued letters cover a compound not claimed by Nobel, and not embraced in the original patent.

It follows that in our judgment the complainant has no just cause of complaint against the defendants, and its suit must be dismissed, with costs, and it is so ordered.

NOTE. See *Atlantic Giant Powder Co. v. Dittmar Powder Co.* 1 FED. REP. 328, and *Dittmar v. Rix*, Id. 342.

THE SWEDISH BARK ADOLPH.

(*District Court, S. D. New York.* November 10, 1880.)

1. ADMIRALTY—COLLISION—SIXTEENTH RULE OF NAVIGATION—NEGLIGENCE—INNOCENT THIRD PARTY.—Where the brig F., with a cargo insured by the libellant, collided at night with the bark A., being struck by the A. on her starboard side amidships, and the F. claimed to be heading southeast, close hauled on the port tack, with the wind east north-east, and to have sighted the green light of the A. a little on the port bow, and to have kept her course, and that the green light crossed to the starboard bow, and then the A. showed both lights, and ran into the starboard side of the F., and that the collision was caused by the A.'s porting after crossing the F.'s bow.

And the A. claimed to be heading north-west less than one point free on the starboard tack, with the wind north-east by north, when the red light of the F. was sighted half a point on her port bow, and thereafter, till the collision, kept her course by the wind three-quarters of a point; and that then the A. ported, and that the red light drew ahead; and that then the F. starboarded and luffed across the A.'s bow, when the vessels were very near each other, thus causing the collision.

Held, that on the evidence the vessels were meeting end on, or nearly end on, and both were bound to port, under the sixteenth rule

of navigation; that the claim made by the A. was incredible as a whole, and that the testimony of her lookout and mate that they made the red light, when first seen, on the port bow, must be rejected as a mistake.

Held, that upon the evidence the wind was about north-east by north, and that after making the red light nearly ahead the A. ported till she came up as close to the wind as she could get with full sails, and kept by the wind till the collision.

That the F. was in fault in not porting; that the A., having ported till she came as close to the wind as she could get, had complied with the rule as far as she was bound to do.

Held, that on the evidence the F. did not keep her course, but star-boarded when dangerously near the A., and that this contributed to cause the collision.

That while the officer of the deck on the A. was clearly negligent in not keeping his attention constantly fixed on the approaching vessel after the light was reported, still this fault did not contribute to cause the collision.

That even an innocent third party—the owner of cargo—injured by a collision, cannot recover against either vessel without alleging and proving that she was guilty of a fault which contributed to bring about the collision.

Simply showing a case of doubt as to which vessel was in fault is not enough to justify a recovery.

The James Bowen and The R. L. Dayton, Dist. Ct. S. D. N. Y.

In Admiralty.

Thomas E. Stillman and Wm. Mynderse, for libellant.

Henry T. Wing, for claimant.

CHOATE, D. J. This is a suit brought to recover damages caused by collision between the French brig *Fernande* and the Swedish bark *Adolph*, which happened about half past 11 o'clock at night, on the fourth day of August, 1880. The *Fernande*, with her cargo, was sunk by the collision, and the libellant having insured the cargo for \$11,500, and paid the loss, sues to recover the same against the *Adolph* on the ground that the collision was caused either in whole or in part by her fault. The *Fernande* was a vessel of 76 tons register, and 125 tons carrying capacity. Her length of keel was 66 feet. She had on board 118 tons of salt fish, and was bound from the island of St. Pierre to the port of St. Martin, Ile de Re, on the south coast of France. The *Adolph* is a bark of 460 tons register. Her length is 141 feet. She was in ballast, and bound to New York from Sables d'Olonne, on the

south coast of France, a little to the south-west of St. Martin. The place of the collision is stated in the libel to have been about 50 miles S. S. W. from Belle Isle. It is stated in the answer to have been at a point about 26 miles E. by S. from the light on the Isle d'Yeu. The difference is not very material; the place, according to the libellant, being about 12 miles in a south-easterly direction from that given by the claimant. Of the two positions I think that given by the claimant is probably more nearly correct, because the witnesses from the Adolph were aided in establishing the place of the collision by an observation of the light on the Isle d'Yeu, at half past 9 o'clock in the evening, when it bore from them E. by N., at a distance which they estimated at 17 miles, and they claim to have been sailing north-west, at about five knots an hour, from half past 9 till the time of collision, the speed being fixed by casting the log at 11 o'clock; and, if their observation of the bearing of the light and their estimate of its distance were correct, and they made that speed for the two hours, they were at or near the place indicated by them at the time of the collision. I think the evidence tends to show that they somewhat overestimated their speed during the two hours. The master of the Fernande, who alone of her crew was examined, could not testify to her position from any actual observation, his charts and papers having gone down with his vessel. He judged of his position partly from information given by a fisherman whom he spoke about noon on the 4th, but the winds during the day had been light and varying, at one time dying away altogether. It is evident that his means of knowing his exact position, or of now stating it, are much less certain than those of the master of the Swedish bark. It is agreed that the night was clear on the water, though dark, the sea smooth, and the wind light or moderate. The Adolph was under full sail, and the Fernande also was carrying all sail except her foresail. She had a fore-try-sail and four jibs. The parties differ as to the direction of the wind. The libel puts it at E. N. E., the answer at N. E. by N.

The case made by the libel is that the Fernande was heading

S. E. to S. E. $\frac{1}{2}$ E., close hauled on the tack, when she made the green light of the Adolph a little to the port bow of the Fernande, and distant apparently about a mile or a mile and a half; that the green light drew across the bow of the Fernande till it appeared on the starboard bow of the Fernande, when the Adolph altered her course so as to show both lights to the Fernande; that when both lights became visible the two vessels were very near together; that the Fernande kept her course, and was struck by the Adolph on the starboard side about amidships, a blow angling from starboard forward to port aft. The faults charged against the Adolph are "not getting out of the way of the brig," "not having a proper lookout," and "porting her helm when and as she did." The case made by the answer is that the Adolph was heading on a course by compass N. W. The lookout reported a red light forward, a little on the lee (port) bow, and the officer of the deck, after seeing the light forward, a short distance off, and knowing that it must be a vessel approaching him, and that it was the duty of such vessel, having the wind free, to pass to leeward of him, told the man at the wheel to port his helm, in order to crowd the bark as close to the wind as possible, and thus give the approaching vessel as much room as possible to pass on his port hand; but that the approaching vessel, instead of porting, starboarded, and luffed up into the wind right across the course of the bark, whereby the bark came in contact with the starboard side of the other vessel, striking her amidships; that the collision was caused solely by the fault of Fernande, in that, having the wind free, and the Adolph being on her starboard tack, about close-hauled, the Fernande, did not keep out of the way of the bark; in that, meeting the bark end on, she did not port and permit each vessel to pass port hand to port hand, as she easily could have done; in that she starboarded and luffed up into the wind directly across the course of the bark and under her bows; and in that she was improperly and insufficiently manned, tackled, and apparelled, and had no competent man at the wheel, and no competent lookout.

The only witness called by the libellant who was on board the *Fernande* was the master, whose testimony tends to establish the case stated in the libel. On the part of the claimant there have been called the master of the bark, who was in his berth below till just before the collision, but who ran up on deck just as the vessels struck; the mate, who was the officer of the deck at the time of the collision; the lookout and the man at the wheel; and two other seamen who were in the mate's watch and stationed amidships. The lookout was the first to see the light of the *Fernande*. His testimony is that he first saw a red light forward a little to leeward; that he was standing on the port side of the top-gallant fore-castle; that he saw the full blaze of it at once; that it came flashing up at once; that he thought it was seven or eight ships-lengths off when he first saw it; that it bore half a point or a point on the port bow; that he went abaft the top-gallant fore-castle and hailed the mate, singing out, "A red light a little to leeward," to which he got response from the mate, "All right;" that he returned to his station and looked at the light from the starboard side of bowsprit, very near the bowsprit; that he then saw the red light right ahead, right in the line of the jib-boom; that he thought it was five, six, or seven ships' lengths off; that he could see the vessel then; that he could not tell how it was heading, but could see sails and forward part of a vessel; that on seeing the red light in this position he hailed again, "Red light ahead;" that he stood and looked at the vessel and saw her come right up and show her broadside; that she lay broadside athwartships of the bark and very close; that he thought then there would be a collision, and sung out, "Keep her off," meaning this as a hail to his own mate to keep the bark off; that he ran down from the top-gallant fore-castle because he was afraid to stay there, and instantly the collision took place.

The mate testified that he was on the poop-deck and heard the first hail of the lookout, "Red light ahead, a little on port bow;" that he ran to the side of the vessel to windward, and looked under the foot of the sail, and saw the red light a little

to leeward, about half a point on the port bow; that he judged it to be seven or eight times the length of his ship away; that he called to the man at the wheel, "Port your helm a little;" that he went to the compass by the man at the wheel, and saw him put his wheel to port, and saw by the compass she came up to N. W. $\frac{3}{4}$ N., her heading before that being N. W.; that after she had so come up and been steadied at that course, and while he still stood by the compass, the lookout hailed him again, "Red light right ahead;" that then he went up to leeward and saw the light right ahead on the jib-boom; that it might be six or seven lengths off; that he then went and looked at the compass, and made no other change in the course of his vessel; that she was then lying as close to the wind as she could lie with full sails; that then the lookout sung out, "Keep her off;" that he, the mate, answered, "It's too late to keep off, we are right on her;" that he saw no light on the other vessel then, but he saw the shade of the vessel; that she was right athwartships of the bark; that it was not five seconds after the lookout's hail, "Keep her off," before the collision.

The man at the wheel did not see the light till the lookout hailed the second time. He testified that then he leaned over to the right and stooped down and saw a red light right ahead. One of the men amidships was in the forecastle and heard the lookout's first hail of "Red light little to leeward ahead," and shortly after his second hail, "Red light right ahead," and hearing that he went out of the forecastle, but he did not look for the light; he heard the lookout say "he thought there would be a collision," and he went on the starboard side and looked and saw a small vessel a couple of ship lengths ahead of the bark, lying athwartships of the bark; that then the lookout sung out "Keep off;" that he stood there and looked a few seconds and then ran back. The other seaman stationed amidships heard the first hail, "Red light little to leeward," and then the hail "Red light right ahead;" that on hearing this he ran forward and jumped up on the top-gallant forecastle and saw the red light, and then saw the broadside of the other

vessel lying athwartships of the bark. The master testified that he had reached the top step of the companion-way when the vessels struck; that he looked back towards the bow at the other vessel, and then immediately went to the compass and saw that the bark headed N. W. $\frac{3}{4}$ N.; then he ran to the wheel, took it from the wheelsman and rolled it over hard a-port, and gave the order to back the yards in order to get clear of the other vessel.

The four seamen of the mate's watch had the wheel successively for the four hours beginning at 8 o'clock. They all testify that the vessel was heading all the time N. W.; that her yards were braced in on the port side, close to the back-stays on the wind. The evidence as to the angle at which the vessels came together was conflicting. The master of the Fernande made the blow an angling blow, and his diagram shows an angle of 52 deg., or a little over $4\frac{1}{2}$ points, as the heading of the Fernande across the bow of the Adolph at the time of collision. The lookout of the Adolph, by his diagram, makes the same angle 87 deg., or $7\frac{3}{4}$ points. The master of the Adolph makes the same angle of the two vessels 103 deg. when he looked back over the bow an instant after they struck. The mate made two diagrams, making the angle in one 90 deg. and in the other 125 deg. Such evidence is worthless, so far as concerns any use of it to fix the precise angle of contact. The observation is made in a moment of peril and alarm, and the thing to be observed is one difficult of judgment if coolly and deliberately observed. The concurrence of the witnesses, however, establishes the general fact that the angle between the vessels at the moment of collision was not a very acute angle, and testimony is also produced that no injury was done to the starboard bow of the Adolph, while her port bow showed bruises and scratches, and the manner in which the bolts in her stem were bent indicated that the blow was nearly head on. The testimony of those on the Adolph is that at the moment of the collision the sails of the Adolph were full. This is not contradicted by the single witness from the Fernande. Assuming, then,

that the angle made by the two vessels at the collision was not less than 52 deg. or $4\frac{1}{2}$ points, as made by the master of the *Fernande*, and that at the time of the collision he was heading S. E. to S. E. $\frac{1}{2}$ E., as he testifies, and that the wind was E. N. E., then, at the time of the collision, the *Adolph* must have been heading N. to N. $\frac{1}{2}$ E., or within $5\frac{1}{2}$ to 6 points of the wind. The testimony of those on the *Adolph* is that she will not lie closer to the wind than 6 to $6\frac{1}{2}$ points.

If any weight is given to the testimony tending to show that the angle between the vessels was greater than $4\frac{1}{2}$ points at the time of collision, it becomes obviously impossible for the *Adolph's* sails to have continued full upon the libellant's theory of the case. This test, though not absolutely certain, favors the theory of the claimant. On the other hand, if the *Adolph* was heading N. W. $\frac{3}{4}$ N. at the time of the collision, and the wind was, as those on the *Adolph* swear, N. E. by N., and the angle between the vessels was at least $4\frac{1}{2}$ points, then the *Fernande* was heading up at least to E. $\frac{1}{4}$ N. This calculation would bring her within $4\frac{3}{4}$ points of the wind. The testimony of the master of the *Fernande* is that she could sail with a light breeze within $5\frac{1}{2}$ points of the wind. If, however, the angle of the vessels was considerably more than $4\frac{1}{2}$ points, as the evidence on the whole tends to show, then, upon the claimant's theory of the case, the *Fernande* must certainly have already luffed up into the wind at the time of the collision. If the evidence were satisfactory that the *Fernande's* sails were full at the instant of collision, this test would be most unfavorable to the theory of the claimant. But the fact of the *Fernande's* sails being full seems to rest mainly on the unsupported testimony of the master that she did not change her course and was kept by the wind with full sails till the collision, and the testimony of the master of the *Adolph* that after getting on deck, but at what precise moment with reference to the time of the collision he could not tell, the *Fernande's* main boom swung to starboard. As to this last circumstance, if she was in the wind the direction of the blow would tend to swing the boom over towards the *Adolph* or to starboard.

The rest of the crew of the Adolph give no testimony as to whether or not the Fernande's sails were full at the time of the collision. It is not a matter of surprise that they should not have observed how this was, in the hurry and confusion of the approaching collision. Nor do the known destinations of the two vessels afford any important aid in testing the truth of their respective allegations as to their courses and the direction of the wind. It is not shown that a N. W. course was not the proper course of the Adolph at that part of her voyage to New York, and S. E. to S. E. $\frac{1}{2}$ E. is so nearly the true course of the Fernande for the Ile de Re from the place of collision, that the argument that she would have headed further to the eastward if she could has little or no force. It appears that about two hours after the collision the Adolph again got under way and steered for Belle Isle, which lay nearly north from the place of collision. This could not, of course, have been done if the wind had remained N. E. by N.; but it also appears by the testimony, and also by the log of the Adolph, that the wind, soon after the collision, hauled more to the eastward.

The case must, therefore, be determined on the conflicting evidence of the witnesses from the two vessels with little extrinsic aid. If the story told by those on the Adolph reasonably accounted for the collision, I should have no hesitation in holding that she had a very great preponderance of the evidence, both as to the direction of the wind and as to the luffing of the Fernande across the course of the Adolph after the Adolph had ported, and while she was heading N. W. $\frac{3}{4}$ N. But unfortunately their story does not account for the collision. If they made the Fernande's red light half a point on their lee or port bow, and then ported three-quarters of a point and steadied at that, it is impossible to understand how the Fernande's red light could draw across to windward, remaining in view all the time, so as to show directly ahead. The situation supposes that the Fernande, when first observed, was half a point to leeward, showing her red light, therefore heading not to pass the bow, but to pass astern of the Adolph. She continues thus to point astern of the Adolph,

and yet draws a point and a quarter further to windward, while the vessels are going over the intervening mile, more or less, that separates them. I see no way in which this is possible, unless by force of a very strong current setting her to windward, and not affecting the Adolph, of which there is no evidence. To get so far to windward of her former position, the Fernande must inevitably have luffed sufficiently to show her green light long before she reached the position testified to by the witnesses, when, still showing her red light directly ahead, she luffed and showed her starboard side.

It is evident, therefore, that there is error in some or at least in one of the elements of the problem as given by the Adolph's witnesses, either in their course or movements, or the bearing of the light when first seen. In this uncertainty it is urged that the account given by the master of the Fernande will account for the collision, and that, as the story of the Adolph does not account for it, his story is to be credited as the more probable. If it were certain that the witnesses from the Adolph could not be mistaken as to the bearing of the light on their port bow, when first seen, it would be difficult to give any credit to their story. While the story of the master of the Fernande, taken alone, would account for the collision, yet on many points essential to the libellant's theory of the case he is contradicted by several witnesses, and not supported by the testimony of the other men on his vessel. It is true that their absence is accounted for by the fact that they left the Adolph to be landed at Belle Isle; and, so far as appears, the libellant has not, before the hearing of the cause, been able to obtain their testimony. But, nevertheless, this want of corroboration, though a mere misfortune of the libellant, leaves the master's testimony very weak, shaken as it is by so serious and positive contradiction.

I think that the testimony in the case is most nearly harmonized by the supposition, not in itself improbable, that the lookout and the mate of the Adolph mistook the bearing of the red light when first seen; that, instead of being half a point on the port bow, it was nearly ahead, and a little on

the starboard bow. The master of the *Fernande* testified that he first saw, and for some time continued to see, a green light over his port bow. This is consistent only with the lookout's seeing the red light over his starboard bow. The lookout and the mate are the only witnesses who testify to the position of the red light when first seen, from their own observation. The lookout stood on the port side of the bowsprit when he observed it. That he reported it a little to leeward is certain, not only from the testimony of himself and the mate, but from that of the other three men on deck at the time. Half a point is a very small angle, and, with a light within half a point of the stern either way, some care in observation is necessary to judge of its exact bearing. Although the lookout had a good point of observation, it does not appear that he ranged it with his eye in the line of the bowsprit. The fact that when he came back to his post on the other side of the bowsprit, after stepping back and reporting it, it seemed to him to be right ahead, and he so reported it, taken in connection with the fact, established by a great weight of testimony, that in the meantime the vessel had ported three quarters of a point, seems to me to tend strongly to show that he mistook its bearing the first time. Moreover, if credit can be given to the courses testified to by the witnesses on the two vessels, S. E. to S. E. $\frac{1}{2}$ E. for the *Fernande*, and N. W. for the *Adolph*, the green light of the *Adolph* could not have been seen over the port bow of the *Fernande*, if the *Fernande* was as much as half a point to leeward of the *Adolph*. If the *Fernande* was to leeward, where the lookout thought he saw her, and the courses are right, the *Adolph* must have shown her red light, and the *Fernande* her red light, and perhaps both lights, to the *Adolph*. The mate went to the starboard sail to see the red light, when first reported. He had heard the lookout's report of a red light ahead a little to leeward. He saw it, and returned to the binnacle, and gave his order to the wheelman. His observation of it was momentary. His impression, as he now recalls it, is that the lookout was right; that

he found it where it was reported. I think he may be mistaken in this, as well as the lookout. His post of observation was not the best to judge of the bearing of a light from the bow, if it was nearly ahead. Perhaps he was the more likely to be mistaken in the bearing, because the lookout had so reported it, a little to leeward. He undertakes to place it by telling where he looked for it, under the foot of the foresail. The effort of the memory often supplies circumstances harmonious with the general impression of a fact or event, but which are supplied only by the imagination and the association of ideas. This witness' supposed statement that he saw the red light draw from its bearing on the port bow across to dead ahead, is not the testimony of the witness to a fact, but his inference from his impression of having seen the light the first time a little to port, and afterwards dead ahead.

Assuming, then, that the red light of the *Fernande* was first seen from the *Adolph* a little on the starboard bow; that as it got near, after the *Adolph* had ported three-fourths of a point, it was, as nearly as could be observed, dead ahead; and that the course of the *Adolph*, when she first saw the *Fernande*, was N. W.,—it is evident that the vessels were meeting end on, or nearly end on. To show the red light to the *Adolph* ahead, or a little on the starboard bow, the *Adolph's* course being N. W., the *Fernande* must have headed a little to the southward of S. E. instead of S. E. or S. E. $\frac{1}{2}$ E., as testified to by her master. The master of the *Fernande* says the angle of their courses was very small, and this is doubtless true. Then, under the sixteenth rule of navigation, each vessel was required to port, in order that each might pass on the port hand of the other. Rev. St. § 4233. The *Adolph* ported. The *Fernande* did not port. I think the proof shows that she starboarded when in close and dangerous proximity to the *Adolph*, and so brought about the collision. But, while the *Fernande* must be held to be in fault, the question still remains whether the *Adolph* was also in fault. It is argued for the libellant that in favor of an innocent third party, the owner of a cargo, on one of the

colliding vessels, it is not enough for the claimant, in order to maintain his defence, to have produced by his evidence a case of doubt; that the claimant is bound to go further, and clear up that doubt. Such, however, is not the rule. Even an innocent third party, injured by a collision, cannot receive his damages against either of the colliding vessels without alleging and proving that that vessel committed a fault which caused, or contributed to cause, the collision. *The James Bowen* and *The P. L. Dayton*, Dist. Ct. S. D. N. Y.; S. C. Cir. Ct.

The specific faults charged against the Adolph in the libel are (1) not getting out of the way of the brig; (2) not having a proper lookout; and (3) porting her helm when and as she did. The first charge of fault is based on the theory that the *Fernande* was sailing close-hauled on the wind, on the port tack, and that the *Adolph* was on the starboard tack three points free, and that the *Fernande* was entitled to keep her course, and the *Adolph* was bound to keep out of her way. But I find the fact to be that the *Fernande* was not close-hauled on the wind, and not entitled to keep her course, nor was the *Adolph* bound to keep out of her way. Both vessels were bound to port. The second charge of fault is not having a proper lookout. This may, perhaps, be considered equivalent to a charge of not keeping a proper lookout. This charge is certainly sustained to this extent, that the mate of the *Adolph*, who was the officer of the deck, was guilty of negligence in not keeping in view the light of the approaching vessel after the lookout reported it. He went to the side of the vessel and looked at it. He then returned to the compass and gave the order to port. From this point the light was not visible. Yet he remained there, without watching the other vessel, till the lookout reported the light right ahead. It is unquestionably the duty of the officer of the deck, when a light is reported, to keep the approaching vessel in view, and under his constant observation, until the risk of collision is wholly passed. This the mate failed to do. This clear act of negligence throws upon the claimant the burden of show-

ing that the collision that ensued was not caused in whole or in part by this act of negligence. If, however, it is shown that the Adolph did exactly what she could and should have done if the mate had kept the other vessel under his constant observation, then this fault, though a gross one, cannot make her chargeable for the collision. The mate gave the order to port. He ported as much as it was possible to do without coming up in the wind, which, under the circumstances, I think he was not bound to do. There was nothing else that he could reasonably be called upon to do, after receiving the lookout's report, to prevent the collision. It is suggested that if he had been watching the other vessel when the lookout called out "Keep her off," he could have starboarded, and so avoided the collision. I think, however, upon the evidence, the time was so short after the *Fernande* unexpectedly and improperly luffed that the Adolph was not chargeable with fault in not making this attempt to avert the consequences of the error of the *Fernande*.

It is also suggested that the lookout did not see the *Fernande* as soon as he should have done. The lookout testified that the red light appeared suddenly not very far off, flushing up at once. This might be the result either of his not having kept a vigilant watch or of the red light being then first turned towards him. The light of the *Fernande* could not be expected to be seen as far off as that of the Adolph. The Adolph was much higher in the water than the *Fernande*. But, before it can be imputed as a fault to the lookout that he did not see the light sooner, it must be established by competent and sufficient proof either that the red light was visible to him before he saw it, or, if the red light was hidden, that the *Fernande* had a green light burning, which he could have seen. The only proof of either of these facts is the unsupported testimony of the master of the *Fernande*. His statement as to his standing steadily on his course for several minutes before the collision is so seriously shaken by the facts which I have been compelled to find against his testimony, that this is not sufficient evidence to sustain this burden of proof. The lookout's

testimony rather tends to show that the red light suddenly and all at once as a bright light became visible to him, and that, as the *Fernande* approached nearly head on, she showed first her starboard and then her port bow. All the proof there is of the *Fernande's* having a green light is that her master testifies that he knew the lights were set and burning that evening, and that, during his watch, he went forward to look at them every 15 or 20 minutes. Nobody on board the *Adolph* saw a green light on the *Fernande* at any time. The fact that when she turned her starboard side towards the *Adolph* in luffing, just prior to the collision, those on the *Adolph* should not have observed the green light, if it was there, is not, indeed, a circumstance entitled to much weight on this question. The vessel herself being within sight, those watching her would not be likely to look for a light, and might easily overlook it. Yet this fact is entitled to some weight, and, on the whole, I think the existence of the green light at the time the vessels came in sight of each other is not made out with sufficient certainty to constitute proof of negligence in the lookout in not seeing the green light, if, before he saw the red light, the starboard bow of the *Fernande* was turned towards him. Nor am I prepared to hold, on the testimony, that if the lookout might have seen the light or lights of the *Fernande* sooner, the *Adolph* did not seasonably port. It is true that, in the answer, it is not charged as a specific act of negligence that the *Fernande* had no green light; but the libel alleges, and the answer denies, that she had proper lights set and burning, and the question here is whether the libellant has proved a material fact which must be first established before the question of the alleged fault of not keeping a proper lookout, in this respect, can arise. The third charge, that the *Adolph* ported when and as she did, has been already discussed.

The case has some features of special difficulty and is not free from doubt, but upon the whole evidence I am not able to find the faults charged against the *Adolph*, or any one of them, proven. The witnesses from the *Adolph* seemed to me

to be both intelligent and credible. The mistake in their protest, which was written in a language they understood but imperfectly, does not seriously impair the effect of their testimony. It is also noticeable that the wheelsman of the *Fernande* had, according to the testimony of the master, been at the wheel continuously since 8 o'clock—three hours and a half. The master says that while he saw the light of the *Adolph* he spoke to him two or three times to keep her close to the wind. And when he saw the two lights of the *Adolph* he ran to call the crew from below, thinking there would be a collision. It is not at all impossible that the wheelsman, from fatigue, steered badly, and that the final fatal movement of luffing across the bow of the *Adolph* was his act by mistake or from panic, without the order or the knowledge of the master. But he is not here to answer for himself, and it is of no avail to pursue the inquiry further.

Libel dismissed, with costs.

GUM v. FROST and others.

(*District Court, S. D. New York.* ———, 1880.)

1. PART OWNER—EXECUTORS.—The executors of the deceased part owner of a vessel are not chargeable for necessities supplied or money advanced the vessel after their testator's death, where they have done nothing to take the benefit of the employment of the vessel, nor given any authority to the master or ship's husband to act for them.
2. SAME—SAME.—It would be a breach of trust for executors to authorize the master or ship's husband, in the absence of an express power under the will, to act in such a matter for them, and no presumption can therefore arise that they have done so.

Stedman v. Fiedler, 20 N. Y. 446.

In Admiralty.

W. R. Beebe, for libellant.

John E. Parsons, for respondents.

CHOATE, D. J. This is a suit brought by the libellant, who resides in London, England, against the owners of the ship

Princeton, an American vessel, to recover advances made to the master for the necessary disbursements of the ship while in the port of London, at the request of the master and of one Frost, who was a part owner, and at the time was acting as ship's husband. The advances were made between December, 1875, and February, 1876, and are alleged to have amounted to about \$1,500. While all the owners are named in the libel as defendants, the only ones who have been served and who have appeared are the respondents Sturges, Mitchell, and Davis, who are sued as executors of Samuel L. Mitchell, deceased, and as such defend the action.

It appears that Samuel L. Mitchell died in 1873; that at the time of his death he was the owner of one-sixteenth part of the vessel; and that these defendants are his duly-qualified executors. The voyage upon which the vessel was when the advances were made by the libellant was therefore subsequent to the death of Mitchell, the part owner. No act of the executors is shown in any way indicating their assent to the employment of the ship, nor any express authority on their part to her employment on their account or for their benefit; nor does it appear that they have, since they qualified as executors, received any share in the earnings. Upon these facts the libellant insists that, as executors, these defendants became jointly the owner of their testator's sixteenth part, and that, as part owners, they are liable for necessities supplied to the ship.

The liability of part owners for supplies furnished at the request of the master, or of another part owner, who is ship's husband, depends on the existence of the relation of principal and agent between the parties. Ordinarily, and in the absence of any prohibition or expressed dissent on the part of the owner sought to be charged, his consent to the employment of the vessel, and his assent to the expenditures, if necessary to the vessel in the due course of her employment, will be presumed. But it may be shown that he has actually parted with his interest, though still a registered owner, or that he has committed the vessel to the exclusive care and control of the other owners, and thereby disentitled himself to share in her earnings, or has expressly dissented from the employment

of the vessel, and communicated such dissent to the master or ship's husband; and in every such case it seems that he will not be liable, unless, indeed, by some previous act, he has misled the party furnishing the necessaries into the belief that he was liable.

The question is, was the master or part owner authorized by the defendants to make the contract for them? *Brodie v. Howard*, 17 C. B. 109; *Mitcheson v. Oliver*, 5 E. & B. 419; *Reeve v. Davis*, 1 Adol. & Ellis, 315; *Hackwood v. Lyall*, 17 C. B. 124; 1 Parsons, Sh. and Adm. 101; Abbott on Shipping, (11th Ed.) Upon the same principle, if the ship is chartered upon terms which give the charterer the entire control of the ship, he is regarded as owner *pro hac vice*, and the general owner is not liable. Nor does the exemption of the owner, or part owner, in the above cases, depend upon notice to the person supplying the necessaries or making the advances of the facts exempting him from liability. Same cases; also see *Macy v. Wheeler*, 30 N. Y. 231. Upon the principle of these decisions, the executors of a deceased part owner, especially if they have done nothing to take the benefit of the employment of the vessel, nor given any authority to the master or ship's husband to act for them, cannot be charged for necessaries supplied or money advanced after their testator's death, and in the course of a new adventure, for it cannot be presumed as to them that they have, as executors, consented to the employment of the vessel, or the expenditure of the money, in prosecuting the voyage. As executors, to whom falls the interest of their testator in the ship, they have no rightful authority to conduct a mercantile adventure for the purpose of making the property available or remunerative. Their power and duty is only to hold and sell and convert the assets into money. Indeed, if they joined in the adventure, while they might make themselves individually responsible, they would have no power to charge the estate for any loss, nor would the assets in their hands be chargeable on account of the business. *Labouchere v. Tupper*, 11 Mo. P. C. 221; *Bacon v. Pomeroy*, 104 Mass. 582; 3 Williams on Ex'rs, (6th Am. Ed.) 179, and notes. It follows that, as it would be

unlawful and improper, and a breach of trust, for executors to authorize the master or ship's husband to act in such a matter for them, no presumption can arise that they have done so. In the case of *Stedman v. Fiedler*, 20 N. Y. 446, it was expressly so held by the New York court of appeals in respect to an administrator. The decision is clearly in accordance with the authorities above cited, and no distinction can be made between executors and administrators, no express power under the will being shown to confer any unusual power on these defendants.

Libel dismissed, with costs as to the defendants Sturges, Mitchell, and Davis, executors.

RICHARDSON *v.* SHIP HAVRE.

(*Circuit Court, S. D. New York.* September 28, 1880.)

1. **APPEAL—BILL OF EXCEPTIONS.**—A bill of exceptions, to present for review, upon appeal to the supreme court, the rulings of the circuit court, must be based on exceptions taken to such rulings at the time the rulings were made.
2. **SAME—SAME—PRACTICE.**—Where no exceptions are taken during the trial, the only paper which the judge can sign upon appeal is a record showing the proceedings which took place in court in the case at the trial prior to the decision of it by the court, embodying the requests to find on both sides, and also the findings made and the written opinion of the court, and the exceptions filed, showing the dates of the several proceedings.

In Admiralty.

Shipman, Barlow, Larocque & McFarland, for libellant.

Blatchford, Seward, Griswold & Da Costa, for claimant.

BLATCHFORD, C. J. In this case, a suit in admiralty *in rem*, there was a final decree by the district court in favor of the libellant. The claimant appealed to this court. The trial in this court took place in February, 1879. At the trial each party presented to the court requests to find certain facts and certain conclusions of law. In June, 1879, the court

filed certain findings of fact and conclusions of law made by it. On the twenty-second of July a final decree was filed, signed by the judge, dismissing the libel, with costs, and dated July 10, 1879. The libellant neither took nor filed any exceptions until July 17, 1880, when he filed a paper containing exceptions to refusals of the court to find certain matters of fact which the libellant requested it to find, the exceptions being made on the ground that the facts which the libellant so requested the court to find were clearly proved by the evidence, and not contradicted by any material evidence in the case, and that therefore the refusal of the court to find the same was in each case an error in law, as a finding against evidence. The same paper contains an exception to a finding of fact which the court made as unsupported by any evidence. The same paper contains exceptions to certain conclusions of law found by the court. With a view to using it on an appeal to the supreme court, the libellant now presents to the court, to be signed and filed, a paper calling itself a bill of exceptions, which represents that said exceptions were filed before the final decree was made.

The act of February 16, 1875, provides that the circuit court, "on deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decree and shall state the facts and conclusions of law separately," and that "the review of the judgments and decrees entered upon such findings by the supreme court upon appeal shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law." Under this statute the supreme court can, on an appeal, determine the questions of law arising upon the record. It can determine the questions of law arising on the facts found by the circuit court. But a bill of exceptions to present for review rulings of the circuit court must be based on exceptions taken to the rulings at the time the rulings are made. No other exceptions can be embraced in a bill of exceptions. If no excep-

tions to rulings are taken before the decree is entered, that is, during the trial, there can be no bill of exceptions. Therefore, in the present case, there can be no bill of exceptions, and I must decline to sign one. The only paper I can sign is one amounting to a record, showing the proceedings which took place in court in the case at the trial, prior to the decision of it by the court, embodying the requests to find on both sides, and also the findings made and the written opinion of the court, and the exceptions filed showing the dates of the several proceedings. It must be left to the supreme court to say what, upon such record, will be the extent of its review in this case. I have changed the proposed bill of exceptions into such a record and have signed it.

ROLLINS *v.* STEAMER E. O. STANARD and others.

(*District Court, E. D. Missouri.* November 25, 1880.)

1. MARINERS—WAGES—RATES.—Where mariners are not engaged at a fixed rate, the courts will allow them the highest rates existing at the time at the port of departure.

In Admiralty.

Drummond & Smith, for petitioner.

R. H. Kern, for respondents.

TREAT, D. J. The demand of libellant, as mariner, is for the sum of \$39, and respondent tendered \$30.30. It seems that for a previous voyage it was agreed that libellant should receive five dollars more a month than roustabouts, and that he consequently was paid at the rate of \$35 per month. On the following voyage, which is that in question, roustabouts received per agreement \$40 per month; and, therefore, libellant demands at the rate of \$45 per month, and shows, by satisfactory evidence, that the difference for classes of service mentioned is as charged.

Mariners are wards of the court, and as such are to be pro-

tected, not to the injury of respondents, but to secure them their just wages. It is very easy for officers of vessels to engage mariners at a fixed rate, and if they do not do so the courts must allow them the highest rates existing at the time at the port of departure.

Under this rule libellant will take his decree for \$39, interest, and costs.

WALSH v. THE STEAM-SHIP LOUISIANA.

(District Court, S. D. New York. November 3, 1880.)

1. SEAMAN—WAGES—DISCHARGE.—Where the officers of a vessel are entitled to discharge a seaman at pleasure, they are bound to be ready to pay his wages at the time of his discharge.

The Schooner David Faust, 1 Ben. 187.

2. SAME—SAME—DEMAND.—In such case a demand of the officer who employed and discharged the seaman is sufficient.

In Admiralty.

J. A. Hyland, for libellants.

J. E. Parsons, for claimants.

CHOATE, D. J. This is a suit for wages. The libellant was hired to serve on board the steam-ship Louisiana as fireman, at the rate of \$40 a month. He served from August 4, 1880, to August 24th, inclusive. On August 24th he was discharged, being told by the assistant engineer, by whom also he had been employed, that his services were no longer required. The next day, which was Tuesday, he went to the vessel and demanded his wages of the officer who discharged him, and was told by that officer that he could not pay him; that Thursday was pay-day; that, if he wished to be paid sooner, he must go to the captain and get an order. This the libellant refused to do, and threatened to sue the vessel. Thereupon this suit was brought without further demand.

There is no dispute about the amount of the libellant's wages. It does not appear in what service the steam ship

was running, but it is assumed by both counsel that the manner of the libellant's discharge, at the pleasure of his employer, was legal, and there seems to have been no signing of articles. I shall, therefore, assume that the vessel had not been employed upon a foreign voyage, and that the case is not one covered by the acts of Congress relating to the time and manner of paying the seamen. The only point made for the claimants is that the libellant should not have costs, because he made no proper demand for his wages before bringing his suit. I think, however, a case is not made out for refusing costs. If the agreement was such that the officers of the vessel were entitled to discharge the man at pleasure, they were bound to be ready to pay him at the time of his discharge. His wages were due at once and should have been paid without any delay. *The Schooner David Faust*, 1 Ben. 187; *Betts' Adm. Pr.* 61. If any demand was necessary, it was enough to make a demand of the officer who discharged him and who had employed him. No case is cited in which costs, in a suit for wages, have been refused simply upon the ground that the suit was brought after the discharge of the seaman and without a demand. The cases cited by the claimant's counsel as authorities for refusing costs are cases in which the seamen, being entitled to a trifling sum for wages, brought suit, tacking on to their claim for wages, which they had not demanded, some exorbitant and unfounded claim, on which they failed to recover. *The Steam-boat Swallow*, 1 Olc. 11; *The Ship Moslem*, Id. 381. I see, therefore, no sufficient reason for refusing costs.

Decree for libellant for \$25.27, with interest from August 24, 1880, and costs.

PUTNAM v. COMMONWEALTH INS. CO.

PUTNAM v. LA CAISSE GENERALE DES ASSURANCES AGRICOLES
ET DES ASSURANCES CONTRE L'INCENDIE.*(Circuit Court, N. D. New York. November 4, 1880.)*

1. REFEREE—FINDING OF FACT.—The finding of a referee upon a question of fact will not be disturbed, except in a case where the finding of a jury upon the same question would be disturbed.
2. INSURANCE—FRAUD—EVIDENCE.—In order to establish fraud in presenting proofs and claim of loss, under a policy of insurance, it must be shown not only that the goods were worth less than set forth, but that a fraudulent valuation was made of the same.
3. SAME—POLICY—AGENT—WAIVER.—A policy duly signed and countersigned was delivered to the agent of the assured by the local agent of an insurance company. It provided by a printed provision that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void." It also provided that it was a part of the contract "that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The policy also contained this clause in writing: "\$3,000 other concurrent insurance permitted." It was subsequently found by a referee that, at the time the policy was delivered, the agent of the company knew that the assured had other insurance upon the property to the extent of \$6,000.

Held, under these circumstances, that a delivery of the policy was a waiver of the implied prohibition contained in the condition in said policy, permitting \$3,000 additional insurance.

Whited v. Germania Fire Ins. Co. 76 N. Y. 415.

4. SAME—SAME—NAPHTHA.—A policy of insurance provided: "If in said premises there be kept * * * petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils, without written permission in this policy, then, and in every such case, this policy shall become void."
- Held*, such provision did not forbid the use of naphtha upon the insured premises for the purposes of illumination.
5. SAME—SAME—"BURNING FLUID."—Such policy also provided that "if, during this insurance, the above-mentioned premises shall be used for any trade, business, or vocation, or for storing, using, or

vending therein any of the articles, goods, or merchandise denominated hazardous or extra hazardous or specially hazardous, * * * printed on the back of this policy, * * * then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease, and be of no force or effect."

Held, that "burning fluid" did not necessarily mean any fluid that would burn, when "burning fluid" was classed as "specially hazardous" under such provision.

6. SAME—SAME—NAPHTHA.—*Held*, further, that the policy was only suspended under such clause while the forbidden use of naphtha continued, and that it revived when such use ceased.
7. SAME—SAME—EVIDENCE.—Evidence of a conversation in relation to a surrendered policy of insurance is admissible in order to prove knowledge of an insurance company's agent of other insurance upon the issue of a subsequent policy.
8. SAME—SAME—SAME.—Evidence is admissible to show that the assured did not read the policy at the time it was delivered to him, in order to prove that a mistake was made in the writing of the policy.

Motion for a New Trial.

Edward C. Risley, for plaintiff.

James B. Perkins, for defendants.

BLATCHFORD, C. J. 1. The defendants contend that the evidence shows that the insured property was burned by the fraudulent practices of the assured. The question is one of fact. The referee has found that the fire arose "from some cause unknown." His finding will not be disturbed except in a case where the finding of a jury on the same question would be disturbed. This is not such a case. On the contrary, on the evidence, a finding that the property was burned by the fraudulent practices of the assured would be set aside by the court.

2. The defendants contend that the plaintiff, through his authorized agent, was guilty of fraud in swearing to and presenting the proofs and claim that he did, in respect to the value of the goods burned. The evidence does not establish that the plaintiff knew that the goods were worth less than the value of them stated in the proofs of loss.

The referee has found, in the first case, that the value of the goods at the time of the fire was "upwards of \$12,000," and, in the second case, that their value at that time was

"\$12,000." It must be established, not only that the goods were worth less than the plaintiff set forth, but that the plaintiff made a fraudulent valuation of them. The evidence is not sufficient to establish either of these facts.

3. The defendant, in the first case, contends that its policy was void when issued. It contains a printed provision that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * this policy shall be void." The policy contains this clause in writing: "\$3,000 other concurrent insurance permitted." When the policy was issued there was \$6,000 other insurance on the property, which continued in force until the fire. The application for the policy in suit was made to an agent of the company in Utica, N. Y., the company being established in Boston, Mass. The policy was signed by the officers in Boston, and was countersigned by the agent in Utica, and was delivered in Utica by him to the agent of the assured.

The policy contains this attestation clause: "In witness whereof, the Commonwealth Insurance Company have caused these presents to be signed by their president, and attested by their secretary, in the city of Boston. But this policy shall not be valid unless countersigned by the duly authorized agent of said Commonwealth Insurance Company." Below that are these words: "Countersigned at Utica, this sixteenth day of October, 1877. J. Carr & Son, agents." The policy contains this provision: "11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The plaintiff claims that the evidence shows that the policy was issued and delivered by J. Carr & Son, with full knowledge that there was already \$6,000 other insurance on the goods; that the issuing and delivery of the policy with such knowledge was a waiver of any prohibition against more than \$3,000 other insurance; and that J. Carr & Son had author-

ity, as the agent of the company, to make such waiver, notwithstanding the eleventh clause. The referee has found as a fact that, at the time the policy was delivered to the plaintiff by the defendant's agent, the fact that the plaintiff had other insurance on the merchandise to the extent of \$6,000 was known to the agent of the defendant. He has found, as a conclusion of law, that the delivery of the policy "by the defendant to the plaintiff, with the knowledge of \$6,000 of existing insurance upon said stock of merchandise, was a waiver of the implied prohibition contained in the condition in said policy, permitting \$3,000 additional insurance." The defendant excepted to the finding of fact "that, at the time of the delivery of its policy, the fact that there was \$6,000 other insurance on the property insured was known to its agent;" and to the conclusion of law "that the delivery of its policy was a waiver of the prohibition contained in the condition in said policy permitting \$3,000 additional insurance."

The defendant contends that the finding that the agent knew of \$6,000 other insurance was not warranted by the evidence. The plaintiff's agent, A. S. Putnam, who applied for the insurance, says that at the time he did so he told the defendant's agent, Carr, that the plaintiff already had \$6,000 insurance, and wanted \$2,000 more. Two policies, of \$1,000 each, were then issued by Carr & Son to the plaintiff on these goods; one by the defendant and the other by a Pennsylvania company, each dated October 16, 1877. A month or less after that the two policies of \$1,000 each were given up by the plaintiff to Carr & Son, and the policy in suit was issued in their place, bearing the same date and running for the same time from October 16, 1877. The \$1,000 policy issued by the defendant, and so given up, contained the words, "\$3,000 other concurrent insurance permitted." It also contained the same clauses as to the policy becoming void, and as to agency and as to countersigning, as the \$2,000 policy afterwards did, and it was countersigned "J. Carr & Son, agents, October 16, 1877, at Utica." Carr testifies that when the original application was made, which resulted in the two \$1,000 policies "nothing particular was said," except that A.

S. Putnam gave an order for \$2,000 insurance on the goods. Carr says that he issued the two policies for \$1,000 each, and delivered them to Putnam. He adds: "I don't remember anything being said as to the amount of other insurance at that time." Carr further says that when the policy in suit was issued he asked Putnam "how much other insurance he had; he said \$2,000 with one agent named Symonds, and \$1,000 with Hoyt & Butler, and I wrote the policy accordingly." The fact was that there was one policy of \$1,000 with Hoyt & Butler and two policies of \$2,500 each with Symonds, and that Carr, instead of writing the \$3,000 in the \$2,000 policy for the first time, had written it before in the \$1,000 policy. Carr further says: "I consented to the amount of insurance. He did not at that time, or at any other time, inform me that he had \$6,000 insurance; nothing of the kind was said. I did not say, on his telling me that he had \$6,000 insurance, that I would give him \$2,000 more; nothing of the kind. What I have testified to is all that was said." "I did not know that Putnam had \$6,000 other insurance. I first knew that fact after the fire." On his cross-examination Carr says: "When these first two policies were issued I do not remember certainly whether anything was said as to the amount of the insurance. Mr. Putnam did not say in the second conversation that he had one policy with Hoyt & Butler and two with Symonds; no such thing. He said he had \$2,000 with Mr. Symonds. This was previous to the second policy having been delivered." In rebuttal Putnam says: "I did not say to Mr. Carr, at the time the two policies were surrendered and the one in suit given, that I had \$1,000 with Hoyt & Butler and \$2,000 with Symonds; did not say that at any time."

It is a well-settled rule that the report of a referee as to the facts is, like the verdict of a jury, conclusive, as a general rule, in a case of conflict of evidence, and is, like such verdict, to be set aside only where the finding of fact is clearly against the weight of evidence. There is here one witness on each side. The burden is on the defendant to set aside the finding of the referee. The referee had the witnesses before him. On the part of the defendant it is urged

that the fact that Carr wrote \$3,000 is evidence that he so understood it; that he had no motive, if he knew it was \$6,000, to put in \$3,000; and that Putnam may have had the motive to say \$3,000 in the fear that he would not be able to get \$2,000 more, if it were known there was \$6,000 already. On the part of the plaintiff it is urged (which is the fact) that the plaintiff had permission in the three policies, amounting to \$6,000, to insure \$19,000 more in other companies, and could have had no motive to conceal the \$6,000. A. S. Putnam testifies that he did not read the first two policies when they were delivered to him, and did not examine the policy in suit when it was delivered to him, and that he first noticed the provision as to other insurance when the policy in suit was being used after the fire to make proofs of loss. On the whole evidence the case is not one for disturbing the finding of the referee that the fact of the existence of \$6,000 other insurance was known to the agent of the defendant when he delivered the policy in suit to the plaintiff. This fact being so, it must be held that the conclusion of law thereon by the referee was correct.

The case of *Whited v. Germania Fire Ins. Co.* 76 N. Y. 415, decided in March, 1879, is a direct authority in point. The policy there contained provisions that if the property should be sold, or if the interest of the assured should not be truly stated, the policy should become void; that any less than a distinct specific agreement, indorsed on the policy, should not be construed as a waiver of any condition therein; and "that any person other than the assured, who may have procured the insurance to be taken, shall be deemed to be the agent of the assured, and not of the company, under any circumstances whatever, or in any transaction relating to this insurance." The policy was issued in 1869, signed by the officers of the company, and countersigned "O. J. Harmon, agent," and was for one year. In 1870 it was renewed for one year, the renewal certificate being signed by the officers, and containing the words "not valid unless countersigned by the duly authorized agent of the company at Oswego," and being countersigned there "O. J. Harmon, agent." Like proceed-

ings took place on a renewal in 1871 for one year. During that year the plaintiff conveyed the premises, and took a mortgage on them. Before the year expired he applied to Harmon for a renewal, and then told Harmon, "the person who had, as agent, as defendant's agent, countersigned the policy and the two renewal certificates," that the premises had been sold, and to whom, and showed him the mortgage, and paid the premium. Harmon said to the plaintiff that he would "make it all right," and gave him a renewal certificate signed and countersigned like the former ones. Harmon was the duly authorized agent of the company at Oswego, and did all of the business of it there except settling losses. In the present case, Carr says: "I received applications for policies, and had authority to write and issue policies, without writing to the company."

In the *Whited Case* the interest plaintiff had in the premises as a mortgagee was not stated in the policy or in the renewal certificates. The defendant contended that the policy was void. The plaintiff contended that there had been a waiver of the requirement that the change of interest of the plaintiff should be indorsed on the policy. The defendant replied that Harmon could not bind the defendant by any such waiver. The court say: "Upon the facts in the case, as settled by the verdict, there was a parol waiver of the conditions rested upon by the defendant, and a parol consent to keep on foot the insurance of the plaintiff, in his new *status* of mortgagee, if Harmon was the agent of the defendant in the dealing for the last renewal, and not the agent of the plaintiff. *Fish v. Cottenet*, 44 N. Y. 538; *Shearman v. Niagara Fire Ins. Co.* 46 N. Y. 526; *Pechner v. Phoenix Ins. Co.* 65 N. Y. 195; *Van Schoick v. Niagara Fire Ins. Co.* 68 N. Y. 434; *Bidwell v. N. West. Ins. Co.* 24 N. Y. 302." Then, referring to the clause respecting agency, the court say:

"That clause we have held to be forceful in *Rohrback v. Germania Fire Ins. Co.* 62 N. Y. 47, and *Alexander v. Same*, 66 N. Y. 464. We have not held it so, as yet, further than the scope of the facts in those cases. The case in 66 N. Y. hangs upon the case in 62 N. Y. In the latter case it was held that, as the

insured had contracted that the person who procured the insurances should be deemed his agent, he must abide by his agreement; and that though, through fault or mistake, that person had, in the application for a policy, misstated to the company the declarations of the assured, whereby there had been brought an untrue representation, yet that, as he had been agreed upon as the agent of the insured, the insured must suffer for the error or the wrong. That case dealt with matters before the issuing of the policy. It is so that the clause in the policy is broad, and takes into the fold of its wording any circumstances whatever, and any transaction relating to the insurance. In its verbal scope it has to do with acts, as well after as before and at the time of the giving out of the policy. But, if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured, and Harmon is to be deemed such procurer, he may not be taken into the service of the insurer as its agent also; or, if he is so taken, the insurer must be bound by his acts and words when he stands in its place, and moves and speaks as one having authority from it; and, *pro hac vice* at least, he does, then, rightfully put off his agency for the insured, and put on that for the insurer.

"Hence it was that in *Sprague v. Holland Purchase Ins. Co.* 69 N. Y. 128, we held that the same clause, in the policy there put out by that defendant, did not make the insured the principal. * * * In the case in hand the defendant has declared, over the hands of its president and secretary, that a renewal certificate from it will not be valid unless countersigned by the duly-authorized agent of the company at Oswego, New York. It had before sent two such certificates to Harmon, which he had countersigned as such agent and delivered to the plaintiff. The plaintiff had paid to him the premium for those renewals, and he had sent them to the defendant. The defendant treated these two certificates as valid, because countersigned by Harmon. Thereby it asserted that Harmon was its duly-authorized agent. It held

him up to the plaintiff as such. It knew, then, that those certificates had been put out and taken as valid; and it must have known that it was so because Harmon thought, and the plaintiff thought,—and that both had reason, from the conduct of the defendant, to think,—that Harmon was the duly-authorized agent of the defendant. It is too late, after letting those two go out as valid, and the third like certificate has been issued and premium paid, for it to say that Harmon is not the agent of the defendant therein, and that he is the agent of the plaintiff. The defendant must have some living, sentient touch of those doing business with it; and when it reposes confidence in the acts therein, and gives him discretionary power to bind and loose, it is idle to say that he is not its agent thereto. The law is too severe to brook such an absurdity; nor will it hold the plaintiff so strictly to the contract he made, as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them, and while under authority from the defendant to act for it. Should it be granted that Harmon was the agent of the plaintiff, even then comes in the rule that one employing the agent of another cannot take advantage from the acts and omissions of that agent to the harm of its principal. It is a rule that if one principal to a contract deal surreptitiously with the agent of the principal, it is a fraud upon the other principal. The defrauded one, if he comes in time, is entitled, at his option, to have the contract rescinded; or, if he elects not to have it rescinded, to have such other adequate relief as the court may think right to give him. *P. & S. P. Tel. Co. v. Ind. Rub., Gut. Perch. & Tel. W. Co.* 10 Ch. Appeal Cases, 526. The principle should be applied, in the case in hand, to the aid of Whited. The case, then, is that of the holder of a policy asking for a renewal of it, and making known to the agent of the insurer the facts which have made or will make a breach of some of the conditions in it, and thereupon receiving from that agent a written renewal certificate, after payment and receipt of the premium, and having from him a promise that he would 'make it all right.' The

powers of the agent were such as that the transaction with him was the same as if done with the defendant; it is bound as fully as if it were so. There was thus a perfect waiver of those conditions of the policy, and it remained a valid contract for another term. When the loss insured against happened, the defendant became liable to pay, and has shown no real defence against the action."

The case of *Whited* was decided with the concurrence of all the judges of the court of appeals. The present case cannot be distinguished from it. The fact that in the *Whited Case* Harmon said that he "would make it all right" does not make this case any weaker than that one. The delivery of the policy by Carr to the plaintiff as a valid contract of insurance was an act of Carr, as the agent of the defendant, asserting such validity, and asserting, in effect, that the policy was issued in view of the statement of A. S. Putnam that there was \$6,000 other insurance, and that any statement of a different amount of other insurance, in the policy, was a mistake, and not in accordance with the fact, as known to both parties, and that any provision in that policy making it void because the \$6,000 was not written on it was then and there waived. Carr had authority to issue policies without writing to the defendant, and must be held to have been the agent of the defendant in receiving the information as to the \$6,000 other insurance, and in making the waiver which on the facts was made.

No distinction can be drawn between this case and a case where, under like circumstances, a party might have stated to the agent correctly the amount of other insurance, and yet nothing was said in the policy as to how much other insurance was permitted. In the *Whited Case* there was, it is true, an entire absence from the policy of any statement of the change of interest, while here there is a statement permitting \$3,000 other insurance. But the absence of the statement of the true other insurance is no different from the absence of the statement of the true interest of the insured, although some sum be named in the policy for other insurance. Nor does it make a distinction that the other insur-

ance existed at the time, and was not put on after the policy was issued. In the *Whited Case* the change of ownership recurred before the last renewal. The *Whited Case* is the most recent decision on the subject in the highest court of New York. It was the unanimous decision of the seven judges, in view of all former decisions. Regarding it as a sound exposition of the law, and as applicable to this case, I must follow it.

4. The defendant, in the second case, contends that its policy was avoided "by the use of naphtha and gasoline." The policy contains these provisions: "If, in said premises, there be kept gunpowder, fire-works, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein, camphene, spirit gas, or any burning fluid, or any chemical oils, without written permission in this policy, then and in every such case this policy shall become void. (4.) If, during this insurance, the above-mentioned premises shall be used for any trade, business, or vocation, or for storing, using, or vending therein any of the articles, goods, or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the class of hazards adopted by the New York board of fire underwriters, and printed on the back of this policy, * * * then and from thenceforth, so long as the same shall be so appropriated, applied, or used, this policy shall cease, and be of no force or effect."

On the back of the policy is a list of articles under the head of "Classes of Hazards," the word "special" meaning "specially hazardous." The following are marked "special:" "Oil, petroleum, and products, other than specified;" "naphtha, benzine, and benzole;" "gunpowder;" "fire-works;" "phosphorus;" "saltpeter;" "nitrate of soda, when stored with other merchandise;" "camphene, stocks of;" "spirit gas, making or selling, or use of;" "burning fluid, stocks of." The following is on the back of the policy: "The use of kerosene oil permitted, on condition that the same be drawn and the lamps be trimmed and filled by daylight only, provided the quality is of the standard required by the laws of the state in

which this policy is issued, but in no case below the United States standard of 110 Fahrenheit." The referee found that during the occupation of the store by the plaintiff he used kerosene and naphtha for the purpose of lighting the same, using naphtha for the first week he was there and kerosene for the remainder of the time; that naphtha was also used in said store by a stranger named Sayles, on two occasions, to show off a naphtha-burning stove, for the sale of which he had an agency; that there was no naphtha on the premises at the time of the fire, neither was there any kerosene on the premises at that time, except a small quantity—a gallon or two—kept for the purpose of replenishing the lamps used to light the store.

As conclusions of law on this subject the referee found: "(2) The use of naphtha or gasoline and kerosene on the premises in question, in the manner herein before described, was not a violation of any of the conditions of said policy. The use of kerosene, if of a certain quality, is expressly permitted. There is nothing in the case to show that the kerosene was not of the quality allowed. The clause under which it is claimed the articles were prohibited is as follows: 'If, in said premises, there be kept * * * petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils.' The said articles were not kept on the premises, within the true intent and meaning of the first part of said clause, as the term 'kept' is clearly employed in contradistinction to the term 'used,' in the concluding portion of the clause, and evidently means the keeping of such articles as objects of merchandise or manufacture. It is quite obvious that the last part of the clause, in speaking of 'camphene, spirit gas, or any burning fluid,' does not refer to the products of rock or mineral oil, such as naphtha, kerosene, etc. The terms, 'camphene,' 'spirit gas,' and 'burning fluid,' are well known to commerce and chemistry, and have a well-understood meaning. Thus, 'camphene' is turpentine purified by repeated distillation; 'burning fluid' is a mixture of camphene and alcohol; and 'spirit gas' is a mixture of the same ingredients in different proportions. This clause should be

construed, not only from the actual signification of the words used, but the evident intent of the whole sentence, according to the maxim, '*noscitur a sociis.*' The character of the prohibition, as to rock oils and their products, is clearly intended to be provided for in the first part of the sentence, and other volatile oils and substances in the last part; and it is absurd to say that the contracting parties intended to repeat in the same sentence a prohibition which had been clearly and carefully expressed before. Even if this were not so, it would seem that, under subdivision 4 of this policy, it is very doubtful whether there would ensue a forfeiture unless the loss occurred during the actual use of the article prohibited upon the premises in question. That clause simply provides for a suspension of the liability of the company while a prohibited article is being used in the premises, and if its use ceases the policy would seem to revive by the force of the agreement itself."

The defendant excepted to the finding of fact "that there was no naphtha or kerosene oil on the premises at the time of the fire, except a small quantity of kerosene;" and to the second conclusion of law "that the use of naphtha or gasoline on the premises, in the manner described, was not a violation of any of the conditions of its policy; that the articles were not kept on the premises within the meaning and intent of the condition of its policy; that the term 'any burning fluid,' used in its policy, does not refer to naphtha;" and, generally, "to the whole of the second conclusion of law, and each part thereof." The exception as to the finding of fact in respect to naphtha and kerosene oil is not insisted on. The referee does not find, as a fact, that any kerosene or naphtha was ever kept on the premises, other than such keeping as is necessarily involved in the facts found—that kerosene and naphtha were used, as found, to light the store, and that naphtha was twice used in the store to show off a naphtha-burning stove. There is no exception by the defendant to a failure to find any other keeping or any other use of kerosene or naphtha. The question is whether the use in fact found avoided the policy. The policy permits the use of kerosene oil of a cer-

tain quality and on a specified condition. It is not found that this permission was departed from. As to naphtha, the prohibition is against keeping naphtha, by name. Other dangerous articles are classed with naphtha, and forbidden to be "kept." Then there is a prohibition against keeping or using certain other articles. Presumably, naphtha, being forbidden to be kept by name, in the first description, was not intended to be included among the articles forbidden to be kept, in the second description; and, not being included among the articles in the second description, is not forbidden to be used, if the use does not involve the keeping within the meaning of the word "kept" in the first description. The use of the kerosene or the naphtha to light the store, or its presence or burning in lamps therein used for lighting the store, cannot be considered as a keeping of the naphtha in the store in the sense of the word "kept" in the first description. No other keeping is found. Neither naphtha nor kerosene is camphene or spirit gas or a chemical oil, or within the expression "any burning fluid."

"Burning fluid, stocks of," is indorsed on the policy as specially hazardous. It does not mean any fluid which will burn, but it means a recognized article known as "burning fluid," and a different article from naphtha or kerosene. Nor does the word "any" change the meaning. There may be several articles, each known as "burning fluid" or "a burning fluid," and each not naphtha or kerosene so as to make it proper to say "any burning fluid." Naphtha being specified in the first description it should have been shown that it was known as "burning fluid" in order to bring it within the second description. Kerosene being allowed to be used, the same thing should have been shown and found as to the particular kerosene used there. Further, the whole policy must be construed together. Although naphtha was indorsed as specially hazardous, and was used, and so was within clause 4, its use both for lighting the store and for showing off the stove had ceased before the fire occurred, and there was no naphtha on the premises at the time of the fire. By clause 4 the policy was to be of no force so long as the forbidden use continued,

but only so long. Such is the meaning of clause 4. The policy is suspended only while the forbidden use continues, and revives when it ceases. In this view, and to give proper and harmonious effect to all the clauses of the policy on the subject, the clause in regard to keeping and using the enumerated articles should be construed as affecting the policy only so long as the articles are kept or used.

5. A. S. Putnam, the plaintiff's agent, was asked on his direct examination as to what was said between him and Carr, the defendant's agent, as to the amount of insurance A. S. Putnam wished on the property at the time he applied for insurance, when the two \$1,000 policies were issued to him by Carr. The question was objected to by the defendant on the ground that the conversation was in reference to a surrendered policy, not the policy in suit, and was therefore immaterial. The question was allowed and answered. The evidence was competent. It tended to show the knowledge professed by Carr as to the prior amount of insurance on the goods in question, and to prove the defence which is held good.

A. S. Putnam was allowed to give evidence, under the defendant's objection, showing that he did not read the two \$1,000 policies when they were delivered to him; that he did not examine the policy in suit when it was delivered to him; and that he first noticed the provision as to other insurance, in the policy in suit, after the fire. This evidence was competent, as, if he did not read and know the contents of the defendant's \$1,000 policy and \$2,000 policy in respect to other insurance, his prior communication of the amount of other insurance to Carr was left to operate in full force. The natural inference that he would have read the policies and thus have seen the mistake was negatived, and it was proper thus to negative it.

The contents of the Hoyt & Butler policy were properly excluded. No other exceptions in regard to evidence seems to be insisted on by the defendant.

The motion for a new trial is denied in each case, and judgment is ordered in each case on the report of the referee, with costs.

MILLER v. UNION PAC. RY. CO.

(Circuit Court, D. Colorado. November 20, 1880.)

1. PLEADING—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—The plaintiff, an employe of the defendant railroad, brought an action against the company for injuries sustained while riding down a steep grade in what he called in his petition a "push-car or hand-car." *Held*, that the petition was defective for uncertainty—(1) In that it did not describe the car with greater particularity; (2) in that it did not state whether the car was with or without brakes; (3) in that it did not state that cars such as the one plaintiff was riding in when injured are usually supplied with brakes.

For these reasons a demurrer to the petition was sustained, but leave was given to amend.

Demurrer.

Geo. H. Grey and T. A. Green, for plaintiff.

H. M. & Willard Teller, for defendant.

McCRARY, C. J. This is a case in which the plaintiff sues to recover damages for an injury received while riding on what he calls in his petition a "push-car or hand-car." It is alleged that he was employed as a carpenter for the defendant company, and was furnished with a car to carry his tools and transport himself from the station on the main line along a side-track or branch road to a coal station; that he went up on this car. It is not stated in the petition whether he pushed it up, or whether he rode upon it and somebody else pushed it; but it is alleged that when he came to return he and several others got aboard the car and started down the track, which was of a very steep grade, and the car got beyond their control, having no means of retarding its movement, and in jumping out of it he was injured.

The demurer to the petition is upon the ground that plaintiff's statement of the case in the pleadings shows that he was guilty of contributory negligence. In the courts of the United States, at least, and I think in most if not all the states, the defence of contributory negligence is a good defence in a case of this kind.

In the first place, this petition is defective for uncertainty.

It says that it was "a hand or push car." It is necessary that the plaintiff should describe the car with more particularity than that, because a hand-car may be one thing and a push-car quite another, and it is impossible to determine the question of contributory negligence without knowing something about the character and construction of the car; because, of course, it is a very material question whether there was any apparatus on the car itself which could be used by persons riding upon it to stop it, or to retard its movement. If it was what is known as a push-car, and if those cars are used ordinarily merely for carrying something, being propelled by some one walking by them and pushing, and if it had no brakes or apparatus for stopping or retarding its movements, then it was negligence to get aboard of it and start down grade without any means of controlling it. I say, then, in the first place, the petition ought to describe the car. To say it was a hand or push car is not enough.

In the second place, if the car on which plaintiff was riding when injured was known as a push-car, and had no brakes or apparatus for controlling its movements, and if the plaintiff, knowing this, got on the car and rode down the grade, this was negligence, and the plaintiff cannot recover. The petition does not show very clearly, to say the least, whether the car was without brakes or not. But I apprehend, from what counsel have said, that it had no brakes.

Another proposition is this: In order to recover, plaintiff must allege that cars such as the one he was riding in when injured are usually supplied with brakes. Of course he cannot recover unless it appears that he went aboard of this car supposing that there was some mode or way by which persons, when traveling on it or riding in it, could retard its movement or stop it. If he knew from having ridden up in the car, or having seen others push it as he came up the track, that it could be controlled only by walking along by it and holding it back, and, knowing that, he got into it with a number of other people to ride on a down grade, he took his chances. It was a clear case of contributory negligence.

The demurrer for these reasons is sustained. If the counsel for plaintiff thinks that in the view of the court he can make a case, he may amend.

BROWN, Adm'r, etc., v. CHESAPEAKE & OHIO CANAL Co.

(Circuit Court, D. Maryland. October 8, 1880.)

1. **SCIRE FACIAS—JUDGMENT—RECITAL.**—A writ of *scire facias*, in reciting a judgment on a prior *scire facias*, need not recite the amount for which such judgment was obtained.
2. **SAME—SAME—SAME.**—Such recital is in no respect uncertain, informal, or insufficient, when the writ recites the judgment on the prior *scire facias*, as it would be set out in full and formal record of that judgment.
3. **SAME—ADMINISTRATOR—MARYLAND.**—A writ of *scire facias* issued by order of an administrator upon the death of a plaintiff will not be questioned under the practice of the state of Maryland, although such administrator has been properly made a party to the cause, and could have at once issued execution on the judgment.

Demurrer to *Scire Facias* and Motion to Quash.

Brown & Brune, for plaintiff.

Attorney General Gwinn, for defendant.

BOND AND MORRIS, JJ. A judgment was recovered in this court by Charles Macalester against the Chesapeake & Ohio Canal Company, at the November term, 1854, for \$5,471.37, and \$33.60 costs. A *scire facias* was issued on that judgment, and on April 4, 1867, judgment of *fiat* was awarded. On April 1, 1879, Arthur George Brown filed a suggestion of the death of the plaintiff, Macalester, and alleged that he had been duly appointed his administrator *d. b. n. c. t. a.*, and the court thereupon ordered that he be admitted as party plaintiff, and have leave to proceed in the case. On that same day, April 1, 1879, by order of said Brown, a writ of *scire facias* was issued. The defendant was summoned, has appeared by counsel, and has demurred to the writ of *scire facias*, and has also moved to quash.

Section 914 of the Revised Statutes of the United States provides that the practice, pleadings, and forms and modes of proceedings in causes in the circuit courts of the United States, such as the present one, shall conform to the practice, pleadings, and forms and modes of proceeding existing in like causes in the state courts, so that the questions raised in the present case are to be determined by the practice and laws which would govern in the state courts of Maryland.

One of the grounds of the demurrer and motion to quash is that the writ of *sci. fa.*, in reciting the judgment on the first *sci. fa.* at the April term, 1867, does not show by proper recitals for what amount judgment was then obtained. The present writ, after reciting that by the original judgment the said Macalester had recovered the sum of \$5,471.37 for his damages, and \$33.60 for his costs and charges, proceeds: "And, whereas, also at a circuit court of the United States, etc., etc., held, etc., etc., on the first Monday of April, 1867, it was considered that the said Charles Macalester *have his execution* against the Chesapeake & Ohio Canal Company, for as well the damages, costs, and charges aforesaid, as also for the sum of \$33.40 for his costs and charges by him sustained by delay of the execution of the judgment aforesaid, as by the record thereof in the said court remaining manifestly appears."

It is to this recital that the objection is addressed. This recital is in the form always, so far as we are advised, used in similar writs in Maryland. It is the form prescribed in Harris' entries, and it seems to us to be entirely proper. The judgment on a *sci. fa.* to revive a judgment is not for a certain sum of money then ascertained and entered up, but, although for some purposes it is called a new judgment, it is simply a judgment that the plaintiff have execution against the defendant for the amount of the original judgment and costs, and the additional costs then by the court adjudged.

The writ in this case recites the judgment on the prior *sci. fa.* exactly as it would be set out in full and formal record of that judgment, (2 Harris' Entries, 140,) and we cannot see

that the recital is in any respect uncertain, informal, or insufficient.

Another ground of the demurrer and motion to quash is that the writ of *sci. fa.* was unnecessary, because the said Brown, administrator, had been by order of the court admitted as party plaintiff, and might at once, without a *sci. fa.*, have had execution; it having been provided by the act of assembly of Maryland, known as the act of 1874, c. 320, that an execution or attachment on any judgment might be issued at any time within 12 years from its date, when there had been no "discharge" of parties to said judgment by death or marriage.

Prior to the act of assembly of Maryland, of 1862, c. 262, § 16, a *scire facias* was necessary whenever a new party was to be benefited or charged before execution could enure on a judgment. *Trail v. Snouffer*, 6 Md. 308. To facilitate the issuing of executions in cases where there had been a change of plaintiff, the act of 1862 enacted that, in case of the death or marriage of any plaintiff, the executor, administrator, or other person who should be entitled to such judgment, should, on application to the court, be made parties to the same, and have such attachment or other execution as if no such death or marriage had taken place. This act, while it remained in force, rendered it unnecessary to have a writ of *scire facias* upon the death of a plaintiff, but it was not in force when the writ in the present case was issued. It was repealed by the act of 1874, c. 320, which enacted in its stead that executions or attachments might issue on any judgment at any time within *twelve* years from the date of such judgment, when there had been no "discharge" of parties to such judgment by death or marriage, omitting entirely the provision for summary method of making new parties plaintiffs which had for the first time been provided by the act of 1862.

Prior to 1862 the law of Maryland on this subject allowed executions to issue at any time within *three* years from the date of the judgment, where there had been no "change" of parties by death or marriage; and the act of 1874 uses precisely the same language, except that the period is twelve years

instead of three, and the word "discharge" of parties is used instead of "change." Under the old law it was always held necessary to have a *scire facias* if there was within the three years a change of parties; and, as the act of 1862 is repealed, it must be now necessary under the act of 1874, if there be a change within twelve years, unless the use of the word "discharge" of parties instead of the word "change" is to have the effect of altering this long-established rule.

It was contended in argument that the word "discharge" had been used in the act advisedly, and was intended to refer to defendants only, as they were the only parties who could be said to be discharged from a judgment; and that as the law of 1874 makes no exception with regard to change of plaintiffs, it is a peremptory direction that execution may issue at any time within 12 years, without regard to any change of plaintiffs.

It seems to us quite probable that either the word "*discharge*" was used inadvertently, or is a misprint for "change;" but if it is not, and is to be construed as applying to defendants only, then the law of 1874 has left the case of a change of plaintiffs entirely unnoticed. An execution cannot issue in the name of a dead plaintiff, and unless by special statute, as in the repealed act of 1862, some summary method is provided, the only method known to the courts of Maryland by which a new party entitled to stand in the place of a deceased plaintiff can become a party to a judgment, and issue execution thereon, is by *scire facias*. This has been the common law for centuries, (Foster on Scire Facias, 99,) and the rule has a strong foundation in justice and equity. By this writ the defendant is warned to appear in court before the seizure of his property, and show any defences he may have,—defences of which the new plaintiff may never have had any opportunity of knowledge,—and also an opportunity is given him of requiring the new party to show how and by what right he claims to have become entitled to the judgment. *Barry v. Hoffman*, 6 Md. 78. It is not to be presumed that the legislature of Maryland intended indirectly to abolish so ancient, well-established, and universal a

method of proceeding, when they have not in terms declared such intention.

How far the court of appeals of Maryland have been from giving countenance to the suggestion that any statute passed by the legislature is to be construed as interfering with the writ of *sci. fa.*, when it does not in terms do so, may be seen from the decision of that court in the case of *Kirkland v. Krebs*, 34 Md. 93, in which it was held that the stay laws, prohibiting during a certain time all writs of execution, did not suspend the issuing of writs of *scire facias*, although the only judgment on the *sci. fa.* would be "*fiat executio*," thus awarding an execution which the stay law had prohibited.

These considerations would, we think, dispose of this objection to the present writ, even were it conceded, as argued, that the writ of *scire facias* to revive a judgment cannot issue in any case, when it is not necessary or required to enable execution to issue. But to this proposition we do not assent.

The statute of Westminster, 2nd, (13 Edw. I. St. 1, c. 45,) granted this writ in order that the plaintiff, in a personal action, if he did not have execution within a year and a day, might not be obliged, as he was by the common law, to bring a new action upon his judgment. This new remedy was considered to be in addition to, and not in substitution of, the former remedy, and it has been held that he might, if he chose, still bring his action on the old judgment, (*Foster on Scire Facias*, 5;) and so, too, if the plaintiff unnecessarily within the year and a day sued out a writ of *sci. fa.*, it was never held that the writ would not lie; the only penalty was that he could not have his *capias* until he had obtained his new judgment of "*fiat executio*" on the *sci. fa.* *Foster on Scire Facias*, 27, note x. The court of appeals of Maryland would seem to have recognized this as an established rule in a case that came before them under the act of 1862, c. 262.

Under that act attachments by way of execution were allowed at any time within twelve years, but if issued more than three years after the date of the judgment they were to be subject to the same defences as in cases of *scire facias*. Un-

der this law, now repealed, the court of appeals held in *Johnson v. Lemmon*, 37 Md. 336, that an attachment after three years was defective unless it contained a clause of *scire facias*. And the same court held in *Anderson v. Graff*, 41 Md. 601, in a case where an attachment was issued *within* the three years containing the *sci. fa.* clause, that although such a *sci. fa.* clause was unnecessary and not required by the act, still the writ was not on that account invalid or defective.

Even, therefore, if it be conceded in the present case that the administrator at the time of issuing the writ of *sci. fa.* had been already properly made a party to the cause, and could have at once issued execution on the judgment, the most that can be said is that the *sci. fa.* was unnecessary. This we do not think would be a fatal objection.

We overrule the demurrer and the motion to quash.

In re THIRD NATIONAL BANK.

(District Court, N. D. Illinois. November 7, 1880.)

1. JUDICIAL SALE—NATIONAL BANK—REV. ST. § 5234.—A sale by a receiver of the property of a national bank, under an order of court, in accordance with the provisions of section 5234 of the Revised Statutes, constitutes a judicial sale.
2. SAME—PURCHASER.—Although the rights of a purchaser at a judicial sale are subject to the action of the court, yet such action must depend upon the general principles and usages of law.
3. SAME—INADEQUATE PRICE—CONFIRMATION.—*Held*, therefore, where a receiver had sold the property of a national bank, under an order of court, in accordance with section 5234 of the Revised Statutes, that such sale would not thereafter be set aside before confirmation upon a subsequent offer of an advance bid of some \$5,000 or \$6,000, where a former sale of the same property had been set aside for inadequacy of price.

In Liquidation. Motion by the receiver to set aside sale.

Mr. Jackson and *H. S. Monroe*, for receiver.

Van H. Higgins, for purchaser.

DRUMMOND, C. J. If we admit that it is competent for the court to set aside a sale for mere inadequacy of price—a point by no means free from difficulty—the question is whether, under the facts in this case, it is proper for the court to set it aside.

This sale, being made under the authority of an act of congress which directs the sale to be made under the order of a court, upon such terms as the court may direct, I think it must be considered to all intents and purposes as a judicial sale. Section 5234, Rev. St. U. S. Then are there any facts in this case which would warrant the court in setting aside the sale for inadequacy of the bid made?

The receiver, on the order of the court, sold the property. The sum bid was \$30,000. Ample notice of the sale had been given to the creditors and stockholders of the bank, and to all the principal real estate brokers in Chicago. There was a large attendance at the sale, and the bidding was quite spirited. The receiver made his report to the court recommending the confirmation of the sale, although some doubt was expressed whether the property had brought its full value; and, as I understand, the comptroller of the currency also concurred with the receiver in this recommendation to the court, and it accordingly made an order that, unless cause was shown to the contrary by the first of November, the sale would be confirmed. On or before November 1st, objection was made to the sale on account of inadequacy of price. Accompanying the objection was a statement that a responsible party would make an advance of \$2,000 on the bid, and upon that statement of facts the court was asked to set aside the sale and order a resale. We must, however, take into consideration an additional fact not yet mentioned, and which must be considered material on an application to the legal discretion of the court, namely, that there had been a similar application by the receiver to the court, under the authority of the act of congress, to sell this property, and the order made, and it had been sold for \$13,000; and the receiver, not deeming the price adequate, had recommended that the

sale should be opened, and the court accordingly set aside the sale. This is therefore the second sale that has been made, and the court is again asked to set aside the sale on account of inadequacy of price. After the district judge had decided (although no order was entered) that the advance of \$2,000 was not sufficient to warrant the court in setting aside the sale, and accordingly had disposed of the question so far as his opinion was concerned, then it seems it was intimated by counsel that there would be an additional advance made, and \$3,000 more was offered by the same person who had previously offered the \$2,000, making it \$35,000 instead of \$30,000. Thereupon the judge was asked to reconsider his action and say that the sale should be set aside, and I am requested by the counsel on both sides, and by the judge, to advise in the matter. Let us see in what position this places the court:

After the court has ordered a sale, and it is made, and the purchaser asks that it shall be confirmed, and the court has decided that a certain advance is not sufficient, they then bid upon the action of the court. In other words, it becomes a sort of auction in the court as to the price at which the property should sell. I do not think this is a proper way to make judicial sales, nor will it tend to make parties come forward, with an assurance, if they bid in good faith for property offered at a judicial sale, they will be protected in their rights; nor will it cause property to bring what it is actually worth. The very fact that people believe that a sale amounts to nothing, or that the court will, of course, set it aside, prevents property from bringing its true value; and nothing, it seems to me, can more effectually destroy the sanctity, so to speak, of a judicial sale—nothing more injuriously affect such a sale—than to allow a practice of this kind.

It is said that a person is now willing to make an advance of \$1,000 after the sale has been confirmed and the order has been entered by the district court. I do not think that this is a proper practice; nor, admitting all that is contended for as to the effect of the inadequacy of price, that this is a proper

case for the exercise of the discretion of the court. There has been one sale which has been set aside for inadequacy of price. The property has been resold, and has brought a sum near its value. All the court could do—all Judge Blodgett could do in the district court—would be simply to order a resale, and perhaps declare that the \$35,000 or \$36,000 should be considered as a bid made. Our practice has never been to allow the receiver or the master, as the case may be, in a judicial sale, to receive a bid, as in England, privately. On the contrary, the practice has been to have the property re-offered for sale, and treat the advance offer made as a bid at the sale.

Perhaps I ought to say something about the purchaser. I think a purchaser at a judicial sale may be said to be clothed with some rights when he makes a bid for the property, and the hammer falls, and the bid accepted by the master or receiver. True, the rights which exist in him are subject to the action of the court; but that action depends upon the general principles and usages of law. It cannot be said that it is a discretion which is merely arbitrary on the part of the court, or capricious; but it must act upon well-settled and generally-recognized principles of equity in cases of this kind, and, if it disregard those principles, the rights of the purchaser can ordinarily be protected in another court. So that the bidder certainly has rights which can be protected by a court of equity. I therefore advise that the order of the district court shall stand confirming the sale.

NOTE. See *Blackburn v. The Selma R. Co.* 3 FED. REP. 689.

UNITED STATES v. BERRY and others.

(District Court, D. Colorado. November 8, 1880.)

1. U. S. COMMISSIONER—WRIT OF PROHIBITION.—A United States commissioner, when acting as an examining magistrate, is a mere officer of the court, as to whom the writ of prohibition is never employed.
2. SAME—CONTROL OF THE COURT.—Such commissioner, however, is subject to the control of the court when acting as an examining magistrate, and the court can assume control of the proceedings whenever justice may require that it should be done.
3. UTE TREATY—COLORADO—ENABLING ACT—18 ST. 474.—The treaty between the United States and the several bands of Ute Indians, proclaimed March 2, 1868, is not repealed by the provisions of the act entitled "An act to enable the people of Colorado to form a constitution and state government," etc., approved March 3, 1875, (18 St. 474.)
4. UTE RESERVATION—FEDERAL JURISDICTION.—*Held*, therefore, that the Ute reservation still remains within the sole and exclusive jurisdiction of the United States.

C. W. Wright, Att'y Gen., for the State.

E. L. Johnson, U. S. Dist. Att'y, for the government.

B. M. Hughes, S. E. Browne, T. M. Patterson, and T. Macon, for defendants.

HALLETT, D. J. Three persons charged with homicide committed on an Indian reservation are held by the marshal, under a warrant issued by a circuit court commissioner, to answer for that crime. It seems that the commissioner assumes jurisdiction to act in the premises on the ground that the place of the alleged crime is within the sole and exclusive jurisdiction of the United States. Denying that proposition, and affirming that the place where the crime is said to have been committed is within the criminal jurisdiction of the state, the attorney general of the state suggests to the court that the proceedings of the commissioner are without authority, and he prays that *prohibition* may issue to arrest them, in order that the state may proceed against the offenders. In support of the application, it is assumed that in making inquiry as to the violations of the laws of the United States a commissioner may be regarded as holding an infe-

rior court, over which this court, having cognizance of the crimes themselves, may have supervisory jurisdiction. But this appears to be founded on an erroneous view of the relations of those officers to this court; for it is plain that commissioners are but officers of the court, to whom are committed some of the duties which must otherwise be performed by the court itself, or the judge thereof. The exigencies of the public service demand that speedy inquiry shall be made into all criminal charges, in order that offenders may be brought to justice; and as, from the press of business or remoteness from the place where the crime may be committed, or other cause, the court cannot always, or ordinarily, perform that service, commissioners are appointed to facilitate the business. In all that they do they are not separate and independent tribunals, but the arms of the court to execute the preliminary work of securing the presence of offenders at the time appointed for arraignment and trial. Indeed, they are not, and under the constitution they cannot be, clothed with judicial power to hear and finally determine any matter whatsoever. Their duties relate only to the detention of the accused until the charge against him may be formally presented to the court, and constitutionally tried. In that they are not bound to hear more than the evidence of the government, and they do not finally determine any question touching the guilt or innocence of the accused. Accordingly, it is said in the books that the function of an examining magistrate is ministerial and not judicial, (1 Bishop's Crim. Pro. § 237;) and upon this consideration alone the writ of prohibition to control the conduct of a commissioner must be denied. High's Remedies, § 769.

But, in a broader view of the nature and extent of his office, it will be apparent that a commissioner is an officer of the court merely, as to whom the writ of prohibition is never employed. It does not, however, follow from this course of reasoning that the court has no control over the proceedings of a commissioner when acting as an examining magistrate. On the contrary, if in the discharge of such duty a commissioner is an officer of the court, it would seem to be proper

in the court to assume control of the proceedings whenever justice may require that it should be done. In important cases it is familiar practice for the judges of superior courts having cognizance of criminal offences to sit as examining magistrates; and, after commitment, the proceedings of magistrates are often reviewed on *habeas corpus* and *certiorari*, in the court having cognizance of the crime.

In that way the courts do but assume control in the preliminary stages of matters of which they have the final decision under the law, and no argument can be necessary to support them in a practice which so clearly tends to further the ends of justice. I do not doubt the authority of the court to take charge of these proceedings, and, as the attorney general of the state has come here to deny the jurisdiction of the federal government, that course will be adopted. The commissioner will be directed to certify his proceedings into this court, to the end that we may consider here what may be alleged against them.

The proceedings were accordingly certified to the court, and the questions involved argued and determined, by consent, in the circuit court:

(Circuit Court, D. Colorado. November 12, 1880.)

MCCRARY, C. J. It is alleged that on the twenty-seventh day of September, 1880, the crime of murder was committed within the district of country set apart by treaty of March 2, 1868, between the United States and several bands of the Ute tribe of Indians, (15 St. 619,) and W. H. Berry and S. N. Hoyt are accused of said crime. The United States claim jurisdiction of the offence on the ground that the murder charged was committed in a place within their exclusive jurisdiction, and in accordance with that claim the accused have been arrested upon information filed before a commissioner of this court, before whom their cases have been

partially examined, and in whose custody they remain, awaiting further proceedings. The state of Colorado also claims that it has exclusive jurisdiction of the offence charged, upon the ground that the murder was committed within the territorial limits of that state, and in a place within its exclusive jurisdiction; and, by an information filed herein by the attorney general of the state, this court is requested to order that the pending proceedings before said commissioner be discontinued, and that the prisoners be turned over to the authorities of the state for trial.

The sole question for our consideration is, was the murder committed in a place within the exclusive jurisdiction of the United States? for if it was not, the federal jurisdiction cannot be maintained.

Section 5339 of the Revised Statutes of the United States provides that "every person who commits murder—*First*, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death."

Section 711 provides that "the jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states—*First*, of all crimes and offences cognizable under the authority of the United States. * * * * *

Section 2145, which is found under the title "Indians," provides as follows: "Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." The punishment of the crime of murder is nowhere expressly provided for in said title, and it follows that where that crime is committed in the Indian country it is within the exclusive jurisdiction of the United States. The question, what territory is included within the term "Indian country," as employed in section 2145 above quoted? is one not free from difficulty. The act entitled "An act to regulate trade and intercourse with the Indian tribes,

and to preserve peace on the borders," approved June 3, 1834, (4 St. at Large, 729,) provides that "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas; also that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

The Ute reservation of Colorado is not within the territory here described. It was not at the time of the passage of that act a part of the United States, but was subsequently acquired from Mexico. It was originally embraced within the territorial limits of the territory of Utah. 9 St. 453.

By section 7 of the act of congress of February 27, 1851, (9 St. 587,) it is provided "that all the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the territories of New Mexico and Utah." Whether the effect of this provision was to make New Mexico and Utah, including what is now the Ute reservation of Colorado, Indian country, is to my mind quite doubtful. It is, however, not necessary to decide that question, since it is perfectly clear that by virtue of the treaty-making power the United States had, prior to the organization and admission into the Union of the state of Colorado, brought the Ute reservation above named within their sole and exclusive jurisdiction, and no doubt whatever is entertained that the federal courts had, prior to the admission of said state of Colorado, complete jurisdiction to hear, try, and determine all cases of murder committed within the limits of that reservation. The determination of this case must turn upon the question whether the United States were ousted of their jurisdiction over the said reservation by the provisions of the act entitled "An act to enable the people of Colorado to form a constitution and state government," etc., approved March 3, 1875, (18 St. 474.) The decision of this question will require the consideration and construction of the said enabling act, in connection with

the provisions of the treaty between the United States and the several bands of Ute Indians, proclaimed March 2, 1868. The first section of the enabling act above cited provides "that the inhabitants of the territory of Colorado, included in the boundaries hereinafter designated, be and they are hereby authorized to form for themselves out of said territory a state government, with the name of the state of Colorado, which state, when formed, shall be admitted into the Union upon an equal footing with the original states in all respects whatsoever, as hereinafter provided."

The treaty, which was in force prior to the passage of said enabling act, contains the following provisions:

"Article 2. The United States agree that the following district of country, to-wit: Commencing at that point on the southern boundary line of the territory of Colorado where the meridian of longitude 107 degrees west from Greenwich crosses the same; running thence north with said meridian to a point 15 miles due north of where said meridian intersects the fortieth parallel of north latitude; thence due west to the western boundary line of said territory; thence south with said western boundary line of said territory to the southern boundary line of said territory; thence east with said southern boundary line to the place of beginning,—shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as, from time to time, they may be willing, with the consent of the United States, to admit among them. And the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall *ever* be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided.

"Art. 6. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and for-

warded to the commissioner of Indian affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained. If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent and notice to him, deliver up the wrong-doer to the United States to be tried and punished according to its laws; and, in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States.

"Art. 7. * * * * The president may at any time order a survey of the reservation, and, when so surveyed, congress shall provide for protecting the rights of such Indian settlers in their improvements, and may fix the character of the title held by each.

"The United States may pass such laws on the subject of alienation and descent of property, and on all subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper."

According to a well-settled rule of construction, since there is no express repeal of any part of the treaty, that instrument and the statute should be construed together, and, as far as possible, the provisions of each should be allowed to stand. An express law conferring certain special rights and privileges is held never to be repealed by implication, unless the intent to effect such repeal be clear. *State v. Branin*, 3 Zab. 484; *State v. Minton*, Id. 529. And the doctrine is supported by numerous other authorities.

We are assisted somewhat in the construction of the enabling act, in so far as it bears upon the question now before us, by reference to a subsequent act of congress, entitled "An act to further the administration of justice in v.4,no.9—50

the state of Colorado," approved June 26, 1876, (19 St. 61,) which provides, among other things, "that when the state of Colorado shall be admitted into the Union, according to the provisions of the act entitled 'An act to enable the people of Colorado to form a constitution and state government, and for the admission of said state into the Union on an equal footing with the original states,' approved March 3, 1875, the laws of the United States, not locally inapplicable, shall have the same force and effect within the state as elsewhere within the United States."

That the treaty above named was a law of the United States is well settled by numerous decisions of the supreme court. *Harkness v. Hyde*, 98 U. S. 476; *United States v. 43 Gallons Whisky, etc.*, 93 U. S. 188; *Worcester v. State of Georgia*, 6 Pet. 515; *The Cherokee Tobacco Case*, 11 Wall. 316.

It may be added that congress has recognized the obligation of all treaties with the Indian tribes lawfully made and ratified prior to March 3, 1871. Rev. St. 2079. And by numerous legislative provisions, and by many acts of appropriation, congress has recognized all such treaties as having the force of law. See Rev. St. §§ 2080, 2081, 2093, 2094, 2095, 2096, 2097, 2099, 2100, 2101, 2116, 2118. If I am right in the conclusion that the treaty above named was one of the laws of the United States, which, by the terms of the act of congress of June 26, 1876, was to remain in force in said state of Colorado after its admission into the Union, then it follows that the Ute reservation remains within the exclusive jurisdiction of the United States by virtue of said treaty.

But, without resting upon this proposition, let us inquire whether the enabling act upon its face ought to be construed as repealing the treaty of March 2, 1868, and as, therefore, depriving the United States of the power of fulfilling the solemn obligations imposed upon them by said treaty. Among the provisions of said treaty is one which declares that the United States "now solemnly agree that no persons, except those herein authorized so to do, and except such officers,

agents, and employes of the government as may be authorized to enter upon said Indian reservation in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as herein otherwise provided." Article 2.

Another provision of the treaty declares that "if bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the commissioner of Indian affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained." Article 6.

The same article further provides for the punishment, according to the laws of the United States, of any person among the Indians who shall commit a wrong or depredation upon the person or property of any one, white, black, or Indians, subject to the authority of the United States, and at peace therewith.

Another provision declares that congress shall provide for protecting the rights of Indian settlers in their improvements, and may fix the character of the title held by each. And still another declares that the United States may pass such laws on the subject of alienation and descent of property, and on subjects connected with the government of the Indians on said reservation, and the internal police thereof, as may be thought proper. All these and many other provisions of the treaty necessarily require for their enforcement that the reservation shall remain under the sole and exclusive jurisdiction of the United States. Indeed, to hold that the jurisdiction of the United States over said reservation is superseded by that of the state, would be to render nugatory nearly every provision of the treaty. When we remember that the policy of keeping the Indian reservations within the exclusive jurisdiction of the national government, until such time as the rights of the Indians therein are extinguished by treaty, has been uniformly pursued with

respect to all Indian reservations in the country, and is expressed so plainly in the provisions of the treaty above named, it is impossible to suppose that it was the intention of congress, by the organization of the state of Colorado, to annihilate the treaty, and to deprive the Indians of their right to protection under it. Where a district of country has been by competent authority set apart as an Indian reservation, and by treaty stipulation the United States have assumed exclusive jurisdiction over it, such district remains an Indian reservation, and the federal jurisdiction over it continues until it is changed by acts of congress, or by treaty, or until the Indian title is extinguished, and this notwithstanding it may be embraced within the limits of a state. *Bates v. Clark*, 95 U. S. 204. The treaty by its terms was to be permanent, and the rights conferred thereby were not to be taken away without the consent of the Indians. It may be conceded that it is within the power of congress to repeal it, but it is clear to my mind that such repeal can only be enacted in express terms, or by such language as imports a clear purpose on the part of congress to effect that end.

To hold the treaty abrogated by the subsequent legislation would be to assume that congress intended to depart in this instance altogether from the policy of treating the Indians as wards of the nation, of keeping them and the lands set apart for their use and occupation within the sole jurisdiction of the United States, and that it intended to turn this particular tribe, with its reservation, over to the jurisdiction and control of the state of Colorado, stripped of its treaty rights, and deprived of the powerful protection of the national government. Such a purpose ought to have been very clearly expressed.

If it be said that the state may have jurisdiction within the limits of the reservation for the purpose of enforcing its criminal laws, without interfering with the rights of the Indians under the treaty, the answer is that one of the obligations imposed upon the United States by the plain terms of the treaty is to enforce their own criminal laws against all classes of offenders within the bounds of the reservation.

Furthermore, it is manifest that if the enabling act repeals the treaty for one purpose, it repeals it for all purposes. If the state has jurisdiction over any part of the territory and people of the reservation, for the purpose of enforcing its criminal laws, it has jurisdiction over the whole of the territory, and over all the people, whether whites, blacks, or Indians. If the jurisdiction now claimed by the state be conceded, then it follows that the state may not only enforce such criminal laws as now exists on its statute books, as against all persons residing or found upon the reservation, but it may enact other laws, if it so wills, in direct conflict with the rights guarantied to the Indians by treaty, as well as destructive of the policy of congress with respect to that people.

This is precisely what the state of Georgia attempted to do in 1829 with respect to the reservation of the Cherokee nation, which was within the limits of that state. But the supreme court of the United States held in the case of *Worcester v. The State of Georgia, supra*, that the state legislation was void because in conflict with a treaty with the Cherokee Indians, which was held to be the supreme law of the land. In that celebrated case Chief Justice Marshall said: "The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected, in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."

An examination of the history of congressional legislation concerning Indian affairs, from the formation of the government down to the present time, will show a continuous and consistent policy of national supervision, care, and protection. Numerous reservations have been from time to time set apart

for their use, and so far as I know every one of these has been kept within the jurisdiction of the United States, whether located in a territory or in a state, until such time as the Indian title has been extinguished or the tribe has forfeited or voluntarily given up its rights. No case is known to me in which a tribe of Indians, with its reservation, has been turned over, without its consent, to the jurisdiction of any state. I am unable to believe that congress has in this instance, with respect to a single tribe and a particular reservation, departed from this policy.

The case of *The Cherokee Tobacco*, 11 Wall. 616, presented, in the opinion of a majority of the judges who took part in the decision, an example of clear and necessary repugnancy between an act of Congress and a pre-existing Indian treaty, and therefore one in which the latter repealed the former by necessary implication. The act of Congress by express terms extended the internal revenue laws imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars "to such articles produced anywhere *within the exterior boundaries of the United States*, whether the same be within a collection district or not."

The previous treaty with the Cherokee Indians exempted from taxation "any merchandise or manufactured products" of the Cherokees, except such taxes as might "be levied by the United States on the quantity sold outside of the Indian territory." It would seem impossible to reconcile the conflict between the two, since the words "any place within the exterior boundaries of the United States," employed by congress in the statute, manifestly included the Indian territory. And yet the fact that Mr. Justice Bradley and Mr. Justice Davis dissented, serves to show the reluctance with which courts yield, even in clear cases, to the doctrine of repeals by implication.

Assuming, however, the soundness of the opinion of the majority in that case, (as we are of course bound to do,) let us consider whether it applies to the case now in hand. To make the two cases parallel it would be necessary to show that congress, in the Colorado enabling act, expressly de-

clared that jurisdiction of the state of Colorado, for the purpose of enforcing its criminal laws, shall extend to all the territory within the exterior boundaries of said state. Such language would, according to the doctrine of the case just cited, have repealed, by necessary implication, so much of the pre-existing treaty as placed the Ute reservation within the jurisdiction of the United States. But no such language is employed by congress in the enabling act. Nothing is said about the jurisdiction of the state over the territory within its boundaries. The people of the territory were to form for themselves a state government, which was to be admitted into the Union on an equal footing with the original states. Does it necessarily and invariably follow from this language that the state should exercise jurisdiction over every foot of territory within its boundaries. I think not. The language is general, and is not necessarily in conflict with an exception in a special case created by some previous law.

Suppose, for example, that the United States had, prior to the admission of the state, reserved for its own use for military purposes a portion of the territory embraced within the limits of the state as subsequently organized, and that the same had been set apart by law for that purpose. Will it be contended that such a reservation would have passed, by virtue of the general terms of the enabling act, into the exclusive jurisdiction of the state? If not, we see at once that the general language of the enabling act may admit of some exceptional special cases. Its language is broad and comprehensive, and is sufficient to confer jurisdiction upon the state government over all its territory, unless, by express enactment, jurisdiction over some part of that territory, for some special purpose, had been previously retained by or vested in the United States. There is probably no state in the Union which does not contain more or less territory which is within the sole and exclusive jurisdiction of the United States. Lands held for military or naval purposes, or for the use of the post-office, or for the courts, as well as such as are held for Indian reservations, are examples. Where such lands are taken after the formation of a state government, it has generally

been deemed necessary, or at least expedient, to obtain from the state a relinquishment of jurisdiction; but where jurisdiction over them is vested in the United States, prior to the organization of the state government, this is not necessary.

My conclusion is that the treaty of March 2, 1868, remains in full force, and has not been repealed; that by virtue of its terms the Ute reservation is within the jurisdiction of the United States, and that the federal courts of this district have jurisdiction of the case stated in the information.

The order prayed is accordingly denied.

HALLETT, D. J., concurs.

MASON and others v. COTTON and others.

(Circuit Court, D. Colorado. November 17, 1880.)

1. RIPARIAN OWNER—USE OF WATER.—Each riparian owner has a right, within his own territory, to the use of the water as it flows, returning it to the channel of the river for the use of others below.
2. SAME—SAME—EQUITABLE RELIEF.—If, however, the water may be conveniently used by two riparian owners, without strictly enforcing such right, a court of equity may refuse to lend its aid.
3. SAME—SAME—SAME.—*Held*, therefore, a riparian owner would not be enjoined from taking water from a river for the use of his mill, although it was not returned to the channel of the river before it reached the territory of an adjoining owner, where it was not clear from the evidence that such adjoining owner could not use the water with substantially the same results through the race of the defendant's mill.

Motion to Dissolve Injunction.

Wells, Smith & Macon, for plaintiffs.

H. M. & Willard Teller and Haynes, Dunning & Haynes, for defendants.

HALLETT, D. J. Plaintiffs own a flouring mill, situated near Fort Collins, in this state, which is operated by water obtained from the Cache-a-la-Poudre river, through a race about one mile and one-fourth in length. This mill and race

have been used by plaintiffs and their grantors since 1872. In the summer of 1879 the Fort Collins Water-power Company, one of the defendants, made another race or canal, parallel in its general course to that used by plaintiffs, and above the latter, so as to take water from the Cache-a-la-Poudre river at a point about one-fourth of a mile above the head of plaintiffs' race. In the same year one Joseph P. Watson, having obtained water-power from the Fort Collins Company, erected a flouring mill on the line of that company's canal, about one-half mile above plaintiffs' mill, and 50 yards from plaintiffs' race. Obtaining power from a point on the river above the head of plaintiffs' race, the position of Watson's mill is such that the waters used in operating it may be delivered into plaintiffs' race, and flow thence down to plaintiffs' mill. When the Watson mill was completed and set in operation in September, 1879, this was done by agreement between Watson and plaintiffs, and both mills were run with the same water through the autumn of that year, and until business was suspended by plaintiffs in the early part of this year. It is said, however, that this use of the same water by both parties was attended with much difficulty in operating plaintiffs' mill, as the water came to them irregularly, and not in sufficient quantity to run the mill. Accordingly plaintiffs revoked the permission they had given to Watson to deliver his water into their own race, and insisted upon their right to take water from the river through their race, as they enjoyed it before the Fort Collins canal was taken out, and before the Watson mill was built. In the early part of this year defendant Carter Cotton purchased the Watson mill, and soon thereafter, in compliance with plaintiffs' demand, changed his tail-race so as to carry the water from his mill to the river *under* plaintiffs' race. It will be remembered, that, by some understanding or agreement between plaintiffs and Watson, the water from this mill was before that time delivered into plaintiffs' race, with a view to run plaintiffs' mill with the same water, and by this change such use was entirely abandoned. In August last it was found that the waters of the river were not sufficient to sup-

ply the races of both mills, and the defendant Carter Cotton, continuing to divert the same for the use of his mill, this bill was filed by plaintiffs in the district court of Larimer county, on the first of September, to restrain such diversion. An injunction was allowed in that court, and subsequently much testimony was taken by a referee before the case was removed into this court; and upon that evidence and the pleadings the present motion to dissolve the injunction is founded.

Upon all the evidence it may be said that there is not at all times in the river sufficient water to run both mills, unless the same water can be used for both of them. Such was the condition of the river when the bill was filed, and it seems that it was in the same condition during last winter. And the right of plaintiffs to take water from the river through their race, as they and their grantors have done for many years, is not denied; so that it may be assumed that at the head of their race, and thence down to their mill, they are entitled to the use of the water as riparian owners. Defendants may have the same right at the point where they take the water from the river, and thence down to the head of plaintiffs' race, where, upon familiar principles, they are bound to return the water to the channel of the river for plaintiffs' use. Conceding, then, plaintiffs' right to divert the water and use it as claimed, defendant Carter Cotton cannot assert a right to the use of it lower down the river, and within the territory already conceded to plaintiffs; for each riparian owner has a right, within his own territory, to the use of the water as it flows, returning it to the channel of the river for the use of others below; and, at the point where defendants' mill is located, that right is apparently in the plaintiffs. Manifestly, then, the defence to this suit, if any exists, is to be found in the circumstance, if it can be established, that the same water may be used for both mills, without serious detriment or hindrance to either. And that will not be an absolute and full defence; because, as before stated, the right of the plaintiffs in the use of the water, as they have hitherto enjoyed it, appears to be clear. But if it is seen that the water may be conveniently used by both

parties, a court of equity may withhold its hand—leaving the parties to the remedies afforded by law. The river not having sufficient water for both mills, independent of each other, if plaintiffs may use the water after it has passed from defendants' mill with substantially the same results as if obtained by continuous flow through their own race, the refusal so to use it would be mere captiousness, in which the court ought not to aid them. In this view the evidence has been carefully examined to determine the fact whether plaintiffs may use the water delivered into their race out of defendants' mill as well as if otherwise obtained. And although the evidence is strongly conflicting and not of the most satisfactory kind, it seems reasonable to believe that the water may be used by both parties. Witnesses testify that with apparatus well known, and already applied in defendants' mill, the water may be sent out to plaintiffs' race in even and continuous flow; and, if so transmitted, the use of it one-half mile below would seem to be free from difficulty. Some testimony is given to show that the water was at times last winter shut off by Watson, to gain a head for his mill, and no doubt is entertained as to the injury to plaintiffs by such conduct. But if those acts of his grantors can be imputed to Carter Cotton, the present defendant, it does not follow that the present defendant is now inclined to the same course, or that he will persist in it when informed that he has no right to proceed in that manner. The question for present consideration is larger and broader than that which may arise from the *manner* of using the water by defendant, and relates to *any use of it* by him during a great part of the year. To maintain this injunction would deny the right of the defendant to *any use* of the water when the volume of the stream is not sufficient for both mills, and when possibly the water may be used by both mills with equal advantage. It is true that we have no right here to impose upon the plaintiffs the terms which the defendant asks to establish—that they shall take water from his tail-race; but we can deny to plaintiffs relief in equity, leaving them to their action at law, in which all the circumstances

may be considered in coming at the measure of damages. If plaintiffs captiously refuse to receive water in a way which may be as useful to them as if it should be brought from the river through their own race, the jury will know what estimate to put upon their conduct. If defendant, by shutting off the water entirely, prevents the flow to plaintiffs' mill, the jury will be equally prepared to redress the wrong. And, when the rights of the parties have been determined at law, if either party shall persist in flagrant violation of such adjustment, equity may come to the relief of the other, with a better understanding of what needs to be done. This injunction will be dissolved, but the bill may stand if plaintiffs conceive that it may be of use to them hereafter.

ADAMS and others v. TERRELL.

(Circuit Court, W. D. Texas. November 20, 1880.)

1. **BANKRUPTCY—JURISDICTION.**—The proceedings in a bankruptcy court can be collaterally attacked upon questions of jurisdiction.
2. **SAME—SAME—DECEASED PARTNER.**—A bankruptcy court cannot acquire jurisdiction over the individual estate of a deceased partner by proceedings in bankruptcy.
3. **SAME—SAME—SAME.**—*Held*, therefore, that a purchaser could not acquire a valid title to the individual real estate of a deceased partner under subsequent proceedings in bankruptcy, although the firm business had been continued by the executors of the decedent in the absence of the surviving partner, and no action had been taken upon the decedent's estate, other than to record his will and file an inventory.

Trespass.

This was an action of trespass to try title, and was submitted to the court upon an agreed statement of facts.

The plaintiffs and the defendant both claimed title to the lands in controversy under one Enoch Jones, deceased; the plaintiffs as his heirs at law, and the defendant as purchaser at a sale made by the order of the district court for the western district of Texas, sitting in bankruptcy.

The following facts appear from the agreed statement:

Enoch Jones, the ancestor of the plaintiffs, who are his only heirs, was in his life-time and at his death seized in fee of the premises in controversy. During his life-time Jones and one Joseph Ulrich had been engaged in commercial business in the city of San Antonio, under the firm name of J. Ulrich & Co. The partnership between them expired by its own limitation in 1861, while Ulrich was in Mexico. In the year 1862 Jones visited Mexico, where he met Ulrich and agreed with him to pay off the debts of the firm, and upon his return to San Antonio published in two newspapers a notice of the dissolution of the firm, and that he assumed its debts. There was no provision in the articles of partnership that the partnership should be continued after the death of either of the partners by the surviving partner and the personal representatives of the deceased partner.

In August, 1863, Jones died, leaving a will, in which I. A. Paschal and Samuel G. Newton were appointed his executors. They qualified and took possession of the estate. The will provided that the executors should not give bond or security, but only take the oath prescribed by law, and that no action should be taken upon the estate in the probate court other than to record the will and file an inventory of the estate. The will further provided that the business of J. Ulrich & Co. should be continued or closed up, as the executors and Ulrich might decide to be for the best interests of the estate and the firm. Ulrich and the executors never had any understanding or agreement to continue the partnership after the death of Jones, nor did Ulrich give any authority to the executors to continue the business of the firm or consent thereto.

On November 2, 1867, the partnership affairs had not been closed up by the executors. On that day a creditor of the firm of J. Ulrich & Co. filed a petition in involuntary bankruptcy against said firm in the district court for the western district of Texas. The grounds upon which the petition prayed an adjudication of bankruptcy were that Ulrich, being absent within six calendar months next before the date of the petition, had, with intent to defraud his creditors, remained ab-

sent from the state of Texas, and that the executors of the estate of Jones had fraudulently suspended and had not resumed payment of the commercial paper of the said firm of J. Ulrich & Co., nor of their estate, for the period of fourteen days.

The executors of Jones, by their attorneys, accepted service of the petition. No notice of said petition was given, nor service of process thereon was ever made on Ulrich, the surviving partner of said firm.

On November 4, 1867, the firm of J. Ulrich & Co. were formally adjudicated bankrupt by the register in bankruptcy, and Frederick Carlton, Esq., was thereupon duly appointed assignee. On the petition of certain creditors of said firm, who had obtained judgments in the United States circuit court against the executors of Jones prior to the said adjudication, the bankrupt court directed Carlton, the assignee, to sell certain lands in the said petition described, being the individual property of the estate of Jones, among which was the property in controversy in this suit. By virtue of this order the said real estate was sold, and the lands now in controversy were purchased by the defendant, who, having complied with the terms of the sale, received on April 10, 1868, a deed therefor from the assignee. The proceeds of the sale were, by order of the bankrupt court, paid to the creditors who had obtained judgments and acquired liens upon the property, the judgments having been propounded in the bankrupt court.

At the time of the institution of the proceedings in bankruptcy, and for several years previous thereto, and at the time of the adjudication, Ulrich was in Mexico. After the distribution of the proceeds of the sale aforesaid, and of the sale of some of Ulrich's individual property, among the creditors of J. Ulrich & Co., Ulrich received his discharge in bankruptcy.

In March, 1867, the executors of Jones were, upon motion of certain of the heirs, required by the probate court of Bexar county to give bond in the sum of \$50,000, or be removed; but no bond was given, and no order of removal nor any other order has been thereafter made.

By article 1371, Paschal's Digest of the Laws of Texas, it is provided that "any person capable of making a will may so provide, by his or her will, that no other action shall be had in the county court in relation to the settlement of his or her estate than the probating and sequestration of his or her will, and the return of an inventory of the estate; and in all such cases any person having a claim or debt against said estate may enforce the payment of the same by suit against the executor of said will; and when judgment is recovered the execution shall run against the estate of such testator in the hands of such executor."

The same article provided that such executor might be required by the probate court to give bond, upon the petition of creditors or other persons interested in the estate, on making it appear that the executor was wasting the estate. It was under these provisions of the law that the judgments above mentioned were recovered against the executors by the creditors of J. Ulrich & Co., and that the executors were required, as above mentioned, to give bond.

Upon this statement of facts the plaintiffs, heirs at law of Jones, brought this suit to recover the lands bought by the defendant, Terrell, and held by him. The defendant pleaded the general issue, and the limitation of two years prescribed by section 2 of the bankrupt act (Rev. St. § 5057) against suits between an assignee in bankruptcy and a person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignees.

A. H. Willie and C. L. Wurzbach, for plaintiffs.

Jacob Waelder and Columbus Upson, for defendant.

WOODS, C. J. Upon the agreed facts the plaintiffs are entitled to a finding and judgment in their favor, unless their title has been divested by the proceedings in the bankruptcy, and the sale and deed made by the assignee in bankruptcy to the defendant. It is insisted by the plaintiffs that the bankruptcy court had jurisdiction neither of the persons of the bankrupts nor of the subject-matter of the bankruptcy. The defendant claims that the bankrupt court having exclusive jurisdiction of the subject of bankruptcies, and having neces-

sarily decided that it had jurisdiction in this case, and having exercised its jurisdiction, its proceedings cannot be collaterally attacked, and must remain binding until reversed in a direct proceeding. He claims further that as long as debts of the firm of J. Ulrich & Co. remained unpaid the partnership existed, at least for the purpose of the collection of its accounts and the payment of its debts; that under the terms of the will of Jones, and the peculiar law of Texas cited in the statement of facts, the executors were, in fact, trustees, and that judgments could be recovered against them and the property of the estate taken in execution, and that a partnership so situated might be put in bankruptcy, notwithstanding the death of one of the partners. He claims further that the acceptance by Ulrich of his discharge was an acceptance of service, or, at least, a waiver; the executors of Jones having accepted service, jurisdiction of the court over the persons of the firm was complete.

The first question to be answered is, can the proceedings of the bankrupt court be attacked in this collateral proceeding?

The rule has long been settled that the jurisdiction of any court may be challenged in any other court where its judgments or decrees are relied on. *Elliott v. Peirsol*, 1 Pet. 328; *U. S. v. Arredondo*, 6 Pet. 691; *Vorhees v. Bank of U. S.* 10 Pet. 475; *Wilcox v. Jackson*, 13 Pet. 511; *Williamson v. Berrn*, 8 Pet. 540. In the case last cited the court says: "The jurisdiction of any court exercising authority over a subject may be inquired into in any other courts where the proceedings in the former are relied on and brought before the latter by a party claiming the benefit of such proceedings." It has in later cases even been held that the record of a judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that those facts did exist. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light & Coke Co.* 19 Wall. 58. These authorities, if authorities were needed, fully dispose of the question under consideration; and it is a most reasonable conclusion. No court can acquire jurisdiction and shut out

inquiry by asserting or assuming that it possesses it. The validity of the proceedings of the bankrupt court, under which defendant claims, are therefore open to attack in this case.

We are next to inquire whether the individual property of the estate of Jones could be drawn into and administered in the bankrupt court by a proceeding against the firm, of which, when alive, he had been a member. Whatever power the bankrupt court possesses over the subject of bankruptcies it derives exclusively from the bankrupt act. Power not conferred by that act it does not possess. We look in vain through its sections to find any authority conferred to put the estate of a deceased person into bankruptcy. The twofold purpose which the bankrupt act has in view, viz., the equal and just distribution of the bankrupt's estate among his creditors, and the discharge of the bankrupt from his debts, does not require the application of the law to the estate of the deceased person. The laws of the states provide for an equitable and just distribution of the decedent's estate, and death has already discharged him of all personal liability. The bankrupt law could, in the case of a deceased person, accomplish nothing not already accomplished without it.

While there is no direct authority given by the bankrupt act over the estates of deceased persons, the implication from what is expressed is strongly against such a jurisdiction. Section 12 of the act (Rev. St. 5090) declares, if the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived; that is, the estate of a deceased may be administered after his death if the court has acquired jurisdiction over it in his lifetime.

This excludes the idea that such jurisdiction is conferred unless it is acquired during the life-time of the bankrupt. It has, therefore, been held that if the debtor, in a case of involuntary bankruptcy, dies after the issuing of the order to show cause and before the trial, the proceedings abate, they being analogous to actions at law for torts which abate on the death of the party. McDonald, 8 B. R. 237.

There being then no warrant in the bankrupt act to justify an adjudication in bankruptcy against the individual estate of a deceased person, can such proceedings be sustained against his estate by means of a proceeding against the late firm, of which the deceased was a member?

The same lack of authority meets us here. There is absolutely no expression in the bankrupt act which warrants the assumption that the bankrupt court can take jurisdiction over the individual estate of a deceased partner. The law does not in terms confer jurisdiction over the assets of a partnership, one of whose members is dead. Hence it has been held that if a firm is dissolved by the death of one of the partners, the executors of the deceased partner cannot be brought into bankruptcy. *In re Stevens*, 1 Saw. 397, 5 B. R. 112.

And if the administrator of the deceased partner has given the necessary bond and taken charge of the partnership property the district court may, in its discretion, even refuse to adjudge the partnership bankrupt. *In re Daggett*, 3 Dill. 83, and 8 B. R. 433.

I conclude, therefore, that over the individual estate of Jones the bankrupt court acquired no jurisdiction by this proceeding in bankruptcy. Nor is this decision to be overturned by the fact that the executors of Jones were not required, under the terms of the will, and by the laws of Texas, to account to the probate court. If they had been purely trustees, deriving no authority whatever from the probate court, the estate committed to them could not be drawn into bankruptcy. The bankrupt law makes no provision for the bankruptcy of trust estates, except by proceedings against the *cestui que trust*. The only reference to trust property is the provision that "no property held by the bankrupt in trust shall pass by the assignment."

An indispensable requisite to an adjudication in bankruptcy is the existence of a person who owns, in his own right, either severally or jointly with another, property which it is the purpose of the adjudicant to bring into the bankrupt court. In the case of the private property of a deceased partner there is no person *in esse* against whom the proceed-

ings will lie. But the plaintiffs insist not only on the want of jurisdiction of the bankrupt court over the subject-matter, but also its want of jurisdiction over the person. It is clear, if what has already been said is true, that the bankrupt court acquired no jurisdiction by a service of its process upon the executor.

The only method by which the property of a partnership dissolved by death can be drawn into the bankrupt court is by service on the surviving partner, in whom is the title to all the partnership property. Ulrich was the surviving partner of the firm of J. Ulrich & Co. No service of any kind was ever attempted to be made on him. But it is said he accepted a discharge from the bankrupt court. This, however, does not cure the want of service, at least so far as it concerns the individual property of Jones, even if it is effectual as to the partnership property. It is, to put it in the best light for the jurisdiction, the entry of an appearance after judgment without process and without service of any kind. The acceptance of the discharge may estop Ulrich; it can have no other effect. My view is, therefore, that the bankrupt court, by the proceedings in bankruptcy against J. Ulrich & Co., acquired no jurisdiction over the individual property of Jones, a deceased member of the firm, and that the title of defendant in this action derived through said proceedings is null and void.

With the bankrupt proceedings must fall the plea of the two years' limitation prescribed by the second section of the bankrupt act against suits between an assignee in bankruptcy and any person claiming an adverse interest touching any property or rights of property transferable to or vested in the assignee. If the bankrupt proceedings are void for want of jurisdiction there was no adjudication of bankruptcy, no bankrupt, no assignee, and no property transferable to or vested in him. In short, all the attempted proceedings in bankruptcy are as if they never had existed. There is, therefore, no basis for the limitation to rest on.

There must be a finding and judgment for the plaintiffs.

In re BRICK, Bankrupt.

(District Court, D. New Jersey. November 29, 1880.)

1. **BANKRUPTCY — PARTNERSHIP PROPERTY.**—Partnership property, as well as individual assets, should be included in the schedules of a bankrupt.

Wilkins v. Davis, 15 N. B. R. 60.

2. **SAME--TORT.**—An interest in an action in tort need not be included in a bankrupt's schedules.
3. **SAME—PARTNERSHIP--TORT.**—Therefore a petition to vacate the discharge of a bankrupt, upon the ground that he failed to schedule his partnership interest in an action of tort for fraud and deceit, will be dismissed.

In Bankruptcy. On petition to vacate discharge.

I. T. Easton, for petitioners.

Wm. L. Dayton, for bankrupt.

NIXON, D. J. This is a proceeding to vacate and set aside a discharge in bankruptcy. The ground alleged in the petition is that the bankrupt wilfully swore falsely in the affidavit annexed to his petition, schedules, and inventory, in that he swore that the said schedules and inventory were a true statement of all his estate, both real and personal, whereas, in truth, the bankrupt, at the time of making the affidavit and petition and inventory, had, together with another, an interest in a suit then pending in the supreme court of the state of New York, to recover the sum of \$17,000 and interest, which suit was commenced on the fourth day of January, 1877, was pending and undetermined when said petition was filed, and the schedules and inventory were made, and was entitled *Riley A. Brick and William W. Campbell*, plaintiffs, and *Frank F. Fowler*, defendant, and that such proceedings were had thereon that a judgment was recovered on the twenty-first day of April, 1879, in favor of the plaintiffs, for \$17,869.85, for damages and costs; and that the bankrupt has now, and had at the time of making the said schedules, inventory, and affidavit, and at the time of the granting of the discharge, an interest in said suit, and in the result thereof, of which his creditors were entitled to the benefit.

The bankrupt has answered the petition denying that he had any beneficial interest therein, which was assignable under the provisions of the bankrupt act, and further submitting, if he had, that it was a partnership asset, and did not go to his assignee for the benefit of his individual creditors.

The facts are substantially as follows: The bankrupt was engaged in business, in the year 1875, with one William H. Campbell, under the firm name of R. A. Brick & Co., and in the month of July of that year made sale to the Peekskill Iron Company of 600 tons of pig iron for \$13,222, and received and accepted in payment therefor six promissory notes of the company, maturing in course in the months of October and November following. The sale was negotiated by Brick, on the part of the partnership, and Fowler, on the part of the iron company, he being its vice-president and trustee. A few weeks after the completion of the transaction by the delivery of the iron and the acceptance of the notes the company stopped payment on its liabilities, became hopelessly insolvent, and paid nothing on account of the purchase. Brick & Co. claimed that Fowler was personally liable for their loss, on account of his wilful misrepresentations of the pecuniary condition of the company made by him to Brick while the negotiations for the sale were going on. He was accordingly sued in an action of tort, in the supreme court of New York, for his false and fraudulent representations of the solvency of the company, and, while this action was pending, the partner Brick filed his individual petition in bankruptcy in this court for his discharge from his personal debts. In his schedules no reference was made to any partnership assets or partnership liabilities, nor to this claim for damages against Fowler.

It is insisted in the petition to vacate the discharge that such an omission by the bankrupt is proof (1) that he wilfully swore falsely to the truth and correctness of his schedules; and (2) that he concealed his assets from his creditors.

The first reason assigned by the counsel of the bankrupt why the discharge should not be set aside on the ground that the schedules did not contain all the assets of the bankrupt, is based on the proposition that where an individual member of

a partnership files his petition in bankruptcy, and makes up his schedules without mentioning partnership assets or debts, and asks for his discharge only from his individual liabilities, he is not required by the law to include any partnership assets in his schedules of property. It is claimed that his discharge, when granted upon such a petition and adjudication, applies to and releases him only from his individual debts, and does not release him from his partnership obligation.

Much support for such a proposition is, doubtless, found in a number of the adjudged cases, (*In re Little*, 1 N. B. R. 341; *In re Sheppard*, 3 N. B. R. 172; *Hudgins v. Lane*, 11 N. B. R. 462; *Cory v. Perry*, 17 N. B. R. 147;) and I have so much respect for the opinion of the learned judges who have thus held that I have, with great care and consideration, examined the grounds on which they have founded their judgment, and regret that I am unable to reach the same conclusion.

There are difficulties, I confess, in the matter growing out of the provisions of the bankrupt act, and the general orders in regard to proceedings in the case of partnership; but, not stopping to set forth in detail the reasons for my opinion, I think that Judge Lowell, in *Wilkins v. Davis*, 15 N. B. R. 60, has correctly stated the law, and indicated the proper practice, and that it is the duty of the bankrupt in such cases to include in his schedules his interest in partnership property, as well as his individual assets.

The second reason assigned is that only such property as is assignable should be included in a bankrupt's schedules, and the suit in question, being an action in *tort*, is not assignable, and would not pass to the assignee in bankruptcy.

Section 5016 of the Revised Statutes, in referring to the schedule and inventory which the voluntary bankrupt must annex to his petition, provides that "the said inventory must contain an accurate statement of all the petitioner's estate, both real and personal, *assignable under this title*, describing the same, and stating where it is situated, and whether there are any, and, if so, what encumbrances thereon." What description of property is stated to be assignable?

Section 5044 provides for the assignment of the bankrupt's estate to the assignee by the judge or register as soon as the assignee has been appointed and qualified, and the property which is vested in him by the deed is set forth in section 5046, to-wit: "All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking, or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the like right, title, power and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made."

It will be perceived that this includes causes of action which the bankrupt had against persons arising from contract, or from the unlawful taking, or detention, or injury to his property, but not causes of action arising *ex delicto*; and clearly the bankrupt is not required to put upon his schedules any rights which would not pass to the assignee.

I am not without authority for this construction of the statutes. In *In re Crockett*, 2 N. B. R. 210, the learned judge of the district court of the United States for the southern district of New York had occasion to examine into the question whether there were any assets of a former copartnership in existence at the time of filing a petition in bankruptcy. In speaking of one of the alleged assets he says: "The claim against Black Brothers & Co. is shown to be a claim in suit arising from the fact that Black Brothers & Co. recommended a certain person to the copartnership as worthy of trust, and the copartnership, on such recommendation, entrusted merchandise to such person for sale, and he disposed of it, and did not account for the proceeds. The suit is brought for fraudulently and deceitfully recommending a person as worthy of trust and confidence. Such a claim is not within the description in the fourteenth section

(§ 5046) of the act, of the assets which pass to the assignee in bankruptcy. It is not a debt or security for a debt, or a right in equity, or a chose in action, or a right of action for property; nor is it a right of action for a cause of action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract."

As the bankrupt was not required to inventory such a claim, and as all the reasons for setting aside the discharge are founded upon such omission, the petition must be dismissed, with costs.

BRITTON, Assignee, etc., v. BREWSTER and others.

(Circuit Court, S. D. New York. November 22, 1880.)

BLATCHFORD, C. J. I have attentively examined the evidence in this case, and the briefs of the counsel, and concur in the conclusion arrived at by the court below, and for the reasons assigned in the decision of the district judge. The controlling questions in the case are so fully considered in that decision that I deem it unnecessary to discuss them at length.

The decree of the district court is affirmed, with costs.

NOTE. See *Britton v. Brewster*, 2 FED. REP. 160.

***In re* CORWIN, Bankrupt.**

(Circuit Court, S. D. New York. November 15, 1880.)

Starr & Hooker, for the creditors.

H. E. Howland, for the bankrupt.

BLATCHFORD, C. J. I concur fully in the decision made by the district court in this case, and in the reasons assigned by that court therefor. The order made by that court April 10, 1880, was correct, and the prayer of the petition of review is denied, with costs.

NOTE. See *In the matter of William S. Corwin*, 1 FED. REP. 847.

KNOX & OSBORN v. QUICKSILVER MINING CO.

(Circuit Court, D. California. October 12, 1880.)

1. PATENT--INFRINGEMENT--QUICKSILVER FURNACES.--A patent issued to the complainants, June, 1870, for improvements in furnaces for roasting ores, and more particularly for extracting the volatile portions of ores, from which it is only desired to save the fumes, such as cinnabar or quicksilver-yielding ores, and also for improvements in the condensers, whereby the metallic or other sulphurous vapors are rapidly and effectually refrigerated without actual contact with water, *held not infringed*.
2. SAME--SAME--SAME.--A patent issued to the complainants, July, 1871, for an improvement in such furnaces, by substituting for the pigeon-hole partitions a series of vertical arches, each lower arch receding from the one above, so that the angle would be greater than the slope at which the ore would lie, thus preventing the filling up of the passages, *held not infringed*.
3. SAME--CLAIM--SPECIFICATIONS.--A claim for an automatically-feeding furnace for roasting ores *will not be sustained* where the furnace described in the specifications is fed by hand at the top of the ore chamber, and no contrivance is shown for feeding it in any other way.
4. SAME--CONTINUOUSLY-WORKING QUICKSILVER FURNACES.--The application to quicksilver furnaces of a mode of operation well known and used in other furnaces, by which ore is constantly subjected to heat, is not the proper subject of a patent.

Wheaton & Scrivner, for complainants.

McAllister & Bergin, for defendant.

FIELD, C. J. This is a suit in equity for an alleged infringement of three patents for improvements in quicksilver furnaces, held by the complainants, with a prayer that the defendant may be compelled to account for and pay over to them the gains and profits derived from the use of the improvements, and be restrained from further infringement.

One of the patents was issued to Blodgett Britton and assigned to the complainants. It is admitted that no furnace was ever built in accordance with its specifications, and all claim for damages under it is waived. The other two patents were issued to the complainants--the first in June, 1870, the second in July 1871. The first patent is for improvements

in furnaces for roasting ores, and more particularly for extracting the volatile portions of ores, from which it is only desired to save the fumes, such as cinnabar or quicksilver-yielding ores, and also for improvements in the condensers, whereby the metallic or other sulphurous vapors are rapidly and effectually refrigerated without actual contact with water. The specifications describe minutely the improvements, and are accompanied with drawings illustrating the construction of a furnace with them. The principal feature of the improvements consists in placing the fire-place on the side of the body of the furnace several feet from its bottom, separated from the chamber in which the ores are deposited by grate bars called a pigeon-hole partition, and having on the opposite side of the chamber, a little higher up than the fire-place, a discharge or draft opening faced with a similar pigeon-hole partition, though of greater capacity than the gratings of the fire-place. A cross draft is thus produced, subjecting the ores, as is said, to a greater heat than if the draft were vertical, and the fumes passed out at or near the top of the furnace. Another feature of the improvements consists in the gradual contraction in width of the furnace towards the bottom, with an incline which conveys the refuse ore to a floor, from which it can be readily removed by hand or machinery. A third feature of the improvements consists in having a small door at the upper end of the furnace, through which the ore is passed into the chamber; and, if the chamber is kept filled, the ore will constantly settle towards the bottom, and as it passes between the fire-place and draft opening be thoroughly roasted, and the vapors carried off through the draft opening and down a vertical pipe into the condenser. The specifications also describe an alleged improvement in the condenser; but, as this improvement was not pressed on the argument, it need not be further noticed.

The claims made upon these improvements, omitting the one in relation to the condenser, are: (1) Placing the fire-place and draft opening on opposite sides of the body of the furnace, so as to draw the heat through the passing ore, substantially as described. (2) Contracting the chamber at the

bottom of the furnace in combination with one or more inclined planes, substantially as described. (3) An automatically feeding furnace, in which the ore is carried by the superincumbent weight in position to be acted upon by the heat, substantially as described.

The second patent of the complainants is for an improvement in the furnace, by substituting for the pigeon-hole partitions a series of vertical arches, each lower arch receding from the one above, so that the angle would be greater than the slope at which the ore would lie, thus preventing the filling up of the passages. With the pigeon-hole partitions, the finer portions of the ore would gradually work into the holes and fill them up. The receding arches obviate this difficulty. This second patent also embraces a new device for feeding the fire with the brush used for fuel; but as no infringement of this invention is alleged, it need not be further referred to.

The second claim mentioned, relating to the contraction of the furnace at the bottom in combination with inclined planes, was not pressed on the argument. It was substantially conceded that it could not be sustained. The case of the complainants must rest, therefore, upon the claim for the cross draft with the pigeon-hole partitions, or the receding arches, and the claim for an automatically-feeding furnace in which the ore is constantly carried by the superincumbent weight into a position to be acted upon by the heat.

This last claim cannot be sustained. There is no automatically-feeding furnace in the case. The furnace described is fed by hand at the top of the ore chamber, and no contrivance is shown for feeding it in any other way. The claim does not correspond with or cover the specifications, and in such cases the patentees are confined to what is expressed in their claim. *Merrill v. Yeomans*, 94 U. S. 568.

But, assuming that the claim could be extended so as to cover a continuously-working furnace, the position of the patentees with reference to it would not be improved. The mode of operation by which ore is constantly subjected to heat was not discovered or invented by them. It had been

used in limekilns for many years before their patent was issued, and before their attention had been directed to furnaces for quicksilver-bearing ores. They only applied what was well known and used in other furnaces to a quicksilver furnace.

There is also evidence in this case—not presented, as I am informed, in the *Great Western Mining Case*—of the existence and use at various places in Europe of continuously-working quicksilver furnaces anterior to the complainants' invention. Professor Church, a gentleman shown to be extensively acquainted with furnaces for roasting and smelting ores, testifies to having seen several of them in operation there. It may be and probably is true that the complainants were the first persons in this country to put into operation a continuously-working quicksilver furnace; but they are not the originators of the idea of a furnace of that kind.

As to the first claim—for the cross draft with the pigeon-hole partitions, or receding arches—it is sufficient to say that the defendants are not using those devices, and have not used them, or what can be regarded as an equivalent for them. They are not, therefore, infringers. The fire-place in their furnace has no pigeon-hole partition, and is near the bottom of the furnace. They have no cross draft, but use a vertical draft, such as is employed in all other furnaces where an outlet is desired for the fumes of the subject consumed or heated.

This case has been heard upon evidence more extended than that presented in the case of the *Great Western Mining Co.*, and much new information as to quicksilver and other furnaces previously used has been furnished. The case has been prepared and presented by counsel on both sides with a fullness and learning worthy of all admiration. It will not probably rest here, but find its way to the supreme court of the United States, where all errors of mine will be corrected.

The improvements of the complainants, in my judgment, have not been infringed by the defendant. A decree must therefore be entered dismissing the bill, with costs; and it is so ordered.

KNOX and another v. NEW IDRIA MINING CO.

(Circuit Court, D. California. October 12, 1880.)

Wheaton & Scrivner, for complainants.

McAllister & Bergin, for defendant.

FIELD, C. J. This case is, in its essential features, similar to that of *Knox & Osborn v. The Quicksilver Mining Co.* [*ante*, 809.] The use by the defendant of a pigeon-hole partition on one side of the furnace, between the ore chamber and fire chamber, does not affect the conclusions reached. The defendant has no pigeon-hole partition between the ore chamber and vapor outlet, and no equivalent for such pigeon-hole partition. The fire-place in the defendant's furnace is on a level with the bottom of the ore chamber, while in the complainants' furnace it is some 12 feet above the bottom of the ore chamber. The relative position of the fire-place and the vapor outlet in the defendant's furnace is not such as to create a cross draft, which is the main feature of the complainants' furnace. The draft in the defendant's furnace is a vertical draft.

A decree of dismissal, with costs, must be entered in this case, and it is so ordered.

**UNITED STATES & FOREIGN SALAMANDER FELTING CO. v.
ASBESTOS FELTING CO.***

(Circuit Court, S. D. New York. September 1, 1880.)

1. PATENT NO. 100,354—PATENT NO. 114,711—INTERFERENCE.—The first claim of patent No. 100,354, granted March 1, 1870, to one Baumann, is invalid, upon the ground of interference with the claims of patent No. 114,711, granted May 9, 1871, to the plaintiff, upon the invention of one Riley.

*See *infra*, 816.

2. INTERFERENCE--FORMER SUIT--JUDGMENT.--Where the question of such interference was the subject of dispute in two distinct suits in two separate districts, and the defendant in the second suit defended the first suit, it was *held* that the issues were the same in the two suits; that the record in the former suit was proper evidence in the latter suit, and that the judgment in the first suit concluded the defendant in the second suit.

In Equity.

George E. Betton, for plaintiff.

Jonathan Marshall, for defendant.

BLATCHFORD, C. J. The plaintiff, as the owner of patent No. 114,711, granted May 9, 1871, to it on the invention of John Riley, brings this bill to have cancelled and annulled a patent, No. 100,354, granted March 1, 1870, to one Baumann. The bill avers that on the application of Riley for his patent his application was put in interference with the patent of Baumann; that priority of invention was decided in favor of Riley by the patent office April 20, 1871; that the defendant owns the Baumann patent; that the plaintiff commenced suit at law in the Massachusetts district against two corporations for infringing said patent by the use of certain material put on their boilers and pipes by the agent of the defendant in this suit; that said suits were defended by the defendant in this suit; that it set up, among other defences therein, that the said invention of Riley was not new by reason of said Baumann patent and invention; that the court, on a trial, sustained the Riley patent by its decision, and the defendant is concluded thereby; and that the two patents are conflicting and interfering patents. The bill alleges that Riley was the first inventor.

The answer alleges that Baumann was the first inventor. It does not deny that the suits in Massachusetts were defended by it, or that it set up, among other defences therein, that said invention of Riley was not new by reason of said Baumann patent and invention. It denies that the Baumann patent formed any part of the issues on which the Massachusetts suit was tried; and that the defendant is not to be prejudiced by reason of said suit, because it was not a party

to it, and because no party having any interest in the Baumann patent was a party to said suit, and because the defendant had at that time no interest in the Baumann patent. The plaintiff put in evidence in this suit the record in one of the Massachusetts suits,—that against the Merrimack Manufacturing Company,—under an objection by the defendant that it was incompetent. It appears by the proofs in this suit that the defendant supplied the covering for boilers and pipes used by the defendant in the Massachusetts suit; that the president of the defendant employed the counsel who defended that suit; and that the defendant paid for the services of said counsel. The record in the Massachusetts suit shows that that suit was brought on said patent No. 114,711, with other patents; that the answer in that suit sets forth that the things claimed in the Riley patent were, before Riley invented them, described in the said patent granted to Baumann, and known to and used by said Baumann; and that the finding of the court was that the defendant had infringed the first and second claims of the Riley patent. It is plain that the first claim of the Baumann patent interferes with the three claims of the Riley patent. The relief to be given by the court, under section 4918 of the Revised Statutes, in the case of interfering patents, is relief to be given on a determination of the question as to which one of the two patents was the first invention of the interfering matters. A reference to section 4904 shows that interference means a dispute on the question of priority of invention. That is the dispute in this suit as between Baumann and Riley. That was the dispute in the Massachusetts suit as between Baumann and Riley, the defendant in this suit having defended that suit, and set up in the answer therein that Riley was not and that Baumann was the inventor of what is claimed in the Riley patent. The issues were the same in the two suits. On the foregoing facts it must be held that the record in the Massachusetts suit is proper evidence in this suit, and that the judgment in that suit concludes the defendant on the question of priority of invention as between Baumann and Riley.

There must be a decree declaring the Baumann patent invalid, as to its first claim, in the whole of the United States, as respects the defendant and all persons who shall derive title under it, to or in said patent subsequently to the entry of such decree, with costs.

UNITED STATES & FOREIGN SALAMANDER FELTING Co. v.
ASBESTOS FELTING Co.*

(Circuit Court, S. D. New York. September 1, 1880.)

George E. Betton, for plaintiff.

Johnathan Marshall, for defendant.

BLATCHFORD, C. J. This suit is brought for the infringement of patent No. 114,711, granted to the plaintiff on the invention of John Riley, May 9, 1871. The bill sets up that the plaintiff brought a suit at law for the infringement of that patent in the Massachusetts district against the Merrimack Manufacturing Company; that the material used by the defendant in that suit was supplied and put on by the agents of the defendant in this suit, and is the same as that made and used by the defendant in this suit; that the defendant in this suit defended that suit, its president being personally present at the trial and giving directions with regard to the same; that the answer in that suit set up as a defence a patent granted to one Baumann, No. 100,354, March 1, 1870; that the judgment of the court was in favor of the plaintiff, and that the defendant is bound by said decision.

The answer in this suit does not deny that the defendant in this suit defended the Massachusetts suit, but avers that the Baumann patent was not introduced in evidence in the Massachusetts suit. The plaintiff put in evidence in the suit the record of the Massachusetts suit, under an objection of the defendant that it was incompetent. It appears by the

*See *ante*, 813.

proof and in this suit that the defendant supplied the covering for boilers and pipes used by the defendant in the Massachusetts suit; that the president of the defendant employed the counsel who defended that suit, and that the defendant paid for the services of said counsel. The record in the Massachusetts suit shows that that suit was brought on said patent No. 114,711, with other patents; that the answer in that suit sets forth that the things claimed in the Riley patent were before Riley invented those described in the patent No. 100,354, granted to Baumann March 1, 1880, and known to and used by said Baumann; and that the finding of the court was that the defendant had infringed the first and second claims of the patent No. 114,711. On the foregoing facts it must be held that the record in the Massachusetts suit is proper evidence in this suit, and that the judgment in that suit concludes the defendant as to the Baumann patent, and as to the alleged prior knowledge and use by Baumann.

For the same reasons that judgment concluded the defendant as to the patent No. 76,773, granted April 14, 1868, to Henry W. Johns, and as to any alleged prior knowledge and use by Johns, the Riley patent is not invalidated by the Hardy & Lay patent, No. 94,739, or the Selden & Kid patent, No. 83,414, or the French patent, No. 94,882, or any of the other patents or matters put in evidence by the defendant.

The proof is satisfactory that the defendant has infringed the first and second claims of the plaintiff's patent, and there must be a decree for the plaintiff for a perpetual injunction, and an account of profits and damages, with costs.

McCARTY and another v. STEAM-PROPELLER CITY OF NEW BEDFORD.

(District Court, S. D. New York. November 30, 1880.)

1. GARNISHMENT—WAGES—SEAMEN.—The wages earned by a seaman, in the coastwise trade of the United States, are not subject to garnishment at the instance of the creditor of the seaman in an action at law brought in a state court.
2. SAME—SAME—SAME—JURISDICTION.—The judgment of a state court, in such case, directing the garnishee to pay such wages to a creditor, is void for want of jurisdiction.
3. SAME—PLEA IN BAR.—A garnishee cannot plead such judgment in bar, where it does not appear that execution has been awarded against him, or that he has been called on or compelled to pay the same.

In Admiralty.

Alexander & Ash, for libellants.

Evarts, Southmayd & Choate, for claimants.

BENEDICT, D. J. This is a proceeding *in rem*, instituted by Daniel McCarty and Owen Hare, to enforce against the steam-propeller City of New Bedford a lien for their wages, earned in the navigation of that vessel in the coastwise trade of the United States, to-wit, in coastwise trade between the city of Fall River, in the state of Massachusetts, and the city of New York, by way of Narraganset bay, the Atlantic ocean, Long Island sound, the East river, and the waters of New York harbor.

The libel was filed in the southern district of New York on the twentieth day of February, 1880. The Old Colony Steam-boat Company intervened as claimants of the vessel, asserting that at the time of the filing of the libel the vessel was owned by them; and on March the 17th filed an answer to the libel, setting up in bar of the action that, on the twenty-fourth day of January, 1880, and the seventh day of February, 1880, the moneys in their hands then due the libellant Hare, and which had been earned by him in the navigation of the said steam-propeller, were in the city of Fall River attached by a constable of said city, by virtue of a writ issued out of the second

district court of the county of Bristol and state of Massachusetts, in an action commenced in said court, and then pending between George S. Eddy, as plaintiff, and said Hare as defendant.

In regard to the demand of the libellant McCarty similar matter is plead in bar, save only that in the suit against McCarty the attachment was served on the twenty-seventh day of February, and subsequent to the commencement of this proceeding.

Thereafter, and on the eighteenth day of May, the claimants filed a supplemental answer, wherein it was further averred that, upon the return of the said writ of attachment in the suit of Eddy against Hare, the plaintiff filed his declaration that the defendant owed him \$50; that the Old Colony Steam-boat Company appeared in said suit as garnishee, and on the sixteenth day of February, 1880, filed their answer, claiming, as matter of law, that the wages of said Hare in their hands were exempt from attachment, and subsequently their additional answer, alleging the commencement of this proceeding by the libellant; that said Hare did not appear in said suit, and on the twelfth day of May it was adjudged by the said second district court that the said Eddy recover against the said Hare the sum of \$50, and the Old Colony Steam-boat Company were charged on their answer with the payment to said Eddy of the amount earned by him from the company; that the said judgment still remains in full force and effect, and the said company has been and is thereby directed to pay to said Eddy, on account of the amount found due to him from said Hare, the entire amount of the wages which are claimed by him in this suit.

To this answer the libellants have excepted, upon the ground that the matters above stated are no bar to the present proceeding.

In regard to the wages of the libellant McCarty, the exception has been submitted to, the attachment having been served subsequent to the filing of the libel. In regard to the wages of the libellant Hare, the answer is insisted upon, and the court is now called on to determine its sufficiency.

The principal question thus presented is whether the wages earned by a seaman in the coastwise trade of the United States are subject to garnishment at the instance of a creditor of the seaman in an action at law brought in a state court. This question appears to have received little or no attention in the courts of this country, but is one deserving a careful examination. In most maritime countries such a question could not be deemed an open one. As early as the Consolato it was declared that against the wages of the seaman no creditor of the ship, nor any other person, can say anything or do anything; for the seamen must have their wages at the place where the master has promised to pay them. Consolato del Mare, c. 95; 2 Pard. Lois Maritime, 131. It was not to be expected that, in a compilation of such antiquity as the Consolato, the modern proceeding by garnishment would be mentioned in terms. But the language employed is broad enough to cover such a proceeding, and the principle declared is plainly inconsistent with the right of a creditor to divert the seaman's wages into his own pocket by means of the process of garnishment.

The principle declared in the Consolato, and thus made part of the law of the maritime world as then understood, appears to have taken the form of an authoritative order in France in the year 1748, (Caumont, Dict. Droit Mar. title "Gens de Mer," § 8, No. 19,) from which time to the present, as it is believed, the law of that great commercial nation has declared seaman's wages to be exempt from attachment at the suit of his creditor, except for debts of a certain character, and then only by virtue of express permission granted by official authority. The importance attached to this exemption in France is seen by its careful preservation during more than 100 years. In that country it is not even permitted to attach the wages of a seaman when deposited by him in a savings bank.

To the same effect has been the law of England, at least from the year 1728 up to the present time. The act of George II. c. 36, declares that the "payment of wages shall be good, valid in law, notwithstanding any action, bill of sale, attachment, or encumbrance whatsoever." While the act 17-18

Victoria, c. 104, § 233, provides that "no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or any attachment, encumbrance, or arrestment thereon." I have not been able to find, either in the reports or the debates in parliament, any occasion calculated to give rise to this provision of the act of George II. at the time of its enactment. There seems to have been no present necessity for such a provision; and this circumstance, coupled with the provision quoted from the Consolato, leads me to believe that the provision in the statute of George II. was simply declarative of the then existing law of England. I am confirmed in this belief by my inability to find any reported case where the courts of England have been called on to construe or give effect to the provision referred to. It seems highly probable that the courts would have been resorted to for the purpose of ascertaining the scope and effect of these provisions if they had been new.

It is doubtless, therefore, correct to say that, by the law of England, as well before as since the statute of George II., seamen's wages are exempt from attachment. If the answer in this case is good, therefore, the law of the United States upon this subject must be at variance with the law of England, France, and probably of most other maritime nations. I have been unable to discover any good ground for supposing that any such variance exists. Indeed, the statute of the United States, passed June 7, 1872, renders it impossible to contend for any such variance, unless it be in regard to a part of the coastwise trade. The provision of the act of June 7, 1872, (now section 4536, Rev. St.,) is as follows: "No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrest from any court." This provision, of course, ends all controversy if it is applicable to the present case. But the claimants insist that it is inapplicable to the libellants' wages because of the subsequent act of June 9, 1874, (18 St. at Large, 64,) which declares that none of the provisions of the act of June 7, 1872,

shall "apply to sail or steam-vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts." When it is considered that the well-known mischiefs aimed at by the act of 1874 had no relation whatever to the provision in the act of 1872, reproduced in section 4536, the language of the act of 1874 affords room to argue that it was not intended to affect the provision of section 4536. Section 4536 declares a privilege in favor of the seaman as against his creditors, and, not being a provision of a character to be applicable to the vessel, may, perhaps, without much difficulty, be held to be unaffected by the act of 1874. Certainly the language of the act of 1874 is ill adapted to convey the idea that it was intended to create a discrimination in the matter of exemption from attachment against seamen who have served in the coastwise trade. No foundation in reason for such a discrimination has been discovered, and it would be unjust. The act of 1874 was, no doubt, passed without reference to its effect upon that provision contained in section 4536. It had an entirely different purpose, and I am by no means certain that it would be going beyond the bounds of proper construction to hold that it has no effect upon the provision of section 4536. "Statutes are to be construed according to the intent of the makers, if this can be ascertained with reasonable certainty, although such construction may seem contrary to the ordinary meaning of the letter of the statute." *Bigelow v. Maynard*, 4 Cush. 316.

But if such a construction cannot be given to the act of 1874, at most the act has simply the effect of a repealing statute. The question then arises whether the exemption declared in the act of 1872 did not exist in the law of the United States prior to the passage of that act? The answer to this inquiry seems to be indicated by what has been already said. If I am correct in the conclusion that such an exemption has always existed upon the continent as well as in England, it is not hard to say that the law of the United States is the same. For while, as was observed by the supreme court of the United States in the case of *The Lottawana*, 21 Wall. 572, the maritime law is only so far opera-

tive as law in any country as it is adopted by the laws and usages of that country, it still remains true that "foreign jurists and ordinances are familiarly quoted as * * * credible witnesses to prove what the marine law is." *Ware, J., The Elizabeth and Jane*, 1 Ware, 39. And, in the absence of any good reason to the contrary, it is incumbent upon the courts of this country to adopt, as far as may be, those rules that have been generally adopted by other commercial nations, and which are referred to as constituting "a sort of common law of the sea." *Ware, J.* Especially is this true in respect to a rule like the one under consideration, resting, as it does, upon considerations of public policy certainly as weighty in this as in any other country, and against which there exists no current of decision. I find, therefore, in the *Consolato*, the French ordinances, and the law of England, good ground for the opinion that by the maritime law of the United States the wages of seamen are not subject to garnishment at the instance of a creditor of the seaman in an action at law. This conclusion is aided by the presence in the act of 1872 of the provision already quoted, for at the time of the passage of that act there was no present necessity for such a provision.

A few—very few—cases of attempts to attach the wages of seamen are to be found scattered through the reports, but I have not been able to find any case where the attempt was successful. So far as the fact goes, it may be truly said, I think, that seamen's wages have been for the most part exempt from attachment in this as in other countries. It cannot be gathered either from debates in congress, the reported cases, or the practice of the maritime community, that any mischief existed which gave rise to the provision in question in the act of 1872. It is therefore fair to conclude that the provision was simply declarative of a rule which had been adopted by the usages of this country from the laws of England and the continent, as unquestionably are several other provisions standing in immediate connection with this one in the statute.

But aside from the provision in the act of 1872, or the rule

of the general maritime law, there are reasons to be found in the provisions of the act of July 20, 1790, (now sections 4530, 4546, 4547, of the Revised Statutes,) which strongly sustain, if they do not compel, the conclusion that seamen's wages are exempt from garnishment in an action at law. The act of 1790, which, so far as it is reproduced in the above-mentioned sections of the Revised Statutes, is wholly unaffected by the act of June 9, 1874, provides that "as soon as the voyage is ended, and the cargo or ballast is fully discharged at the last port of delivery, he (the seaman) shall be entitled to the wages which shall then be due." This provision is absolute. There is no exception in the case of service of an attachment. It does not say the seaman or his creditor. But the statute proceeds, (section 4546:) "Whenever the wages of any seaman are not paid within 10 days after the time when the same ought to be paid, or any dispute arises between the master and seaman touching wages, the district judge of the judicial district where the vessel is * * * may summon the master to appear before him to show cause why process should not issue against such vessel, her tackle, apparel, and furniture, according to the course of admiralty courts, to answer for the wages." Section 4547. "If the master against whom such summons is issued neglects to appear, or, appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge shall certify to the clerk of the district court that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the vessel, and the suit shall be proceeded on in the court, and final judgment shall be given, according to the usual course of admiralty courts in such cases."

By this provision every seaman is given a statutory right, in every case of subtraction of his wages, to have the master of the vessel summoned to show cause why process should not issue against the vessel, and jurisdiction is given to the district judge of any district where the vessel may be to so summon the master. It is difficult to see how the district

court can be ousted of jurisdiction to issue the summons thus prescribed, by an attachment issued at the instance of a creditor of the seaman in an action at law. But the statute goes further, and declares that the vessel shall be forthwith seized unless the master show that the wages have been "paid or otherwise satisfied or forfeited." An absolute and statutory right is here conferred upon the seaman to have the vessel seized and sold in every case where the master omits to show that the wages have been paid or otherwise satisfied or forfeited. Surely it is straining language to say that proof of service of an attachment upon the ship-owner at the instance of a creditor of a seaman would show that the wages had been paid or otherwise satisfied or forfeited, within the meaning of the act of 1790. Still further, the statute declares that any dispute between the seaman and the ship-owner touching the wages shall be determined according to the course of the admiralty, unless the seaman elect to bring his action at law. Is it possible that the seaman can be deprived of the right thus conferred by a statute of the United States, by the act of his creditor in causing an attachment to be served upon the ship-owner? Yet such must be the result, if wages are subject to be attached by process from a state court. Such is the result claimed here, where it is said that this seaman, Hare, cannot proceed against the vessel for his wages, and cannot have his dispute determined according to the course of the admiralty, because one Eddy, a creditor, has, without his concurrence, commenced a suit for him against the owners, in the second district court of the county of Bristol.

Another provision in the act of 1790 may be referred to as bearing upon this same question. The act declares (section 4547) that "in such suit all the seamen having cause of complaint of the like kind against the same vessel shall be joined as complainants." This is a provision of statute made not only to save the ship-owner from being subjected to several suits by members of the same crew, but also to save the seamen the expense and delay attending several distinct suits. It is by virtue of this provision that in this proceeding not only

Hare but McCarty is a party libellant. Of course, the attachment issued at the instance of the creditor of Hare against Hare's wages is no bar to the proceeding so far as McCarty is concerned, and if this answer prevail these owners will be harassed by two suits—one at the instance of Eddy, for Hare's wages in the second district court of Bristol county, and the other by McCarty here; and further liable, for aught I know, to as many other suits as there were members of the crew; while Hare must bear the expense of one suit and McCarty of another, and this in the face of a statute of the United States declaring that there shall be but one suit, in which all the crew shall be joined as complainants. These provisions of the act of 1790 not only furnish strong evidence that at that early day wages of seamen were understood to be exempt from attachment, but they are wholly inconsistent with the existence of a right on the part of a creditor to attach a seaman's wages in an action at law, and therefore seem to compel the conclusion that such attachments are not allowed by the laws of the United States.

The same conclusion is arrived at from an application, to the peculiar contract of the mariner, of the principles of the common law invoked by courts of law in cases of garnishment. Garnishment is said to be, in effect, a suit by the defendant in the plaintiff's name without the defendant's concurrence, and, indeed, in opposition to his will. Drake on Attachments, § 451. It is well settled that garnishment cannot have the effect of changing the nature of the contract, and it does not lie where its effect will be to allow a creditor of the principal debtor to enforce a contract in a manner different from its legal effect and the agreement of the parties. *Sawyer v. Thompson*, 4 Foster, 515. If these principles be applied to the seamen's contract, it will be found necessary, as I think, to declare that the wages due a seaman constitute a demand of such a character that the law forbids an attachment of them in an action at law.

"The contract of hire for mariners stands on reasons peculiar to itself." Ware, J., in *The Elizabeth and Jane*, 1 Ware, 35. One characteristic element in this contract is that, upon

grounds of public policy, the law has attached to it a lien upon the ship. This feature is deemed of such essential importance that an express agreement on the part of seamen to waive the lien will be disregarded. "Admiralty courts will withhold their sanction from such agreements, not only upon equitable considerations growing out of the improvidence and want of intelligence of seamen in their bargains, but also upon considerations of public policy." *Betts, J., The Sarah Jane*, B. & H. 414. "Every maritime nation has a deep interest in the protection and preservation of seamen, as a class of men of indispensable necessity for the purposes both of peace and war. Their preservation, therefore, for the service of the country, becomes an object of public policy." *Ware, J., Hutchinson v. Combs*, 1 Ware, 65. Now, it is obvious that the necessary result of a garnishment of wages in an action at law is the destruction of the seaman's lien upon the ship. The only result of the proceeding of garnishment is to secure a personal liability on the part of the garnishee to apply the money to the payment of the plaintiff's debt. That is the sole object of the proceeding. It has been said that garnishment is a compulsory assignment, accomplished by the process and similar in legal effect to a voluntary assignment of the debt by the debtor. But it is only the personal liability of the garnishee that can be so assigned. An assignment of his wages by the seaman himself does not transfer the lien. *The A. D. Patchin*, 12 Law Rep. 21. By a garnishment of wages no transfer to the attaching creditor of the seaman's lien upon the ship is effected. The lien is simply destroyed. The very act of the common-law court in acquiring jurisdiction to enforce the seaman's demand against the owner of the ship, puts an end to the seaman's lien. Where such is the necessary result of the garnishment, the proceeding will not lie, for it is not permitted by means of garnishment to deprive the defendant of the benefit of his contract. The case in hand directly involves the application of this principle, for here the ground taken is that Hare cannot proceed against the ship, and it will not be contended that Eddy, his creditor, can, in the second district court of the county of Bristol.

Says Chief Justice Taney: "The seamen as a matter of right are entitled to the process of the court to enforce payment promptly in order that they may not be left penniless and without means of support; and the right to this remedy is as well and firmly established as the right to the paramount lien. No court of common law can enforce or displace this lien. It has no jurisdiction over it, nor any right to obstruct or interfere with the lien or the remedy which is given to the seamen. *Taylor v. Carryl*, 20 How. 601.

Again: "Courts of law cannot undertake, by garnishment, to settle the equities between the parties in order to subject an equitable demand which the defendant may have against the garnishee to the payment of the defendant's debt." Drake on Attachments, 457. The contract of the mariner is an equitable contract, and it gives rise to equitable rights not capable of being preserved by a court of common law. One of these is the right to submit the terms of the contract to be scrutinized, and, if necessary, reformed, by a court of equity before it be enforced. This right the mariner may waive by electing to enforce his contract as it is, in a court of common law; but such a waiver cannot be effected against his will by the act of a creditor in attaching his wages. To permit that would be to deprive the seaman of a substantial right without any consideration. The reality and importance of this right of the mariner will be made to appear by referring to a few familiar passages selected out of many to the same effect. *Sprague, J.*, says: The court "scrutinizes all contracts respecting seamen's wages in order to see that advantage has not been taken of their necessities, ignorance, or thoughtless imprudence." *The Bark Rajah*, 1 Sprague, 199. "In all maritime countries seamen are privileged to go in their own peculiar courts, whose course and form of proceeding are adapted to the direct and guileless character of the sailors." *Ware, J.*, 2 Davies, 118, *The Betsy and Rhody*. A court of admiralty, "within its jurisdiction, acts upon the liberal, enlarged principles of a court of equity, and especially it does so in dealing with the contract between the seamen and owners." *Ware, J.*, Id. "A court of admiralty it is certain will, in some

cases, give a remedy where a court of common law would not." *Ware, J., Davies*, 119.

If such be the privilege of the seaman under the law, it cannot be permitted to a creditor, against the will of the seaman, to submit his rights to be determined by a court of law in a proceeding where of course the ship-owner has the right to defend, and where he may set up, for instance, that the sailor had agreed that all differences in regard to his wages should be referred to the chamber of commerce or the court of common pleas of the city and county of New York, as was done in the case of *The Sarah Jane*, B. & H. 402; or that the owners, by the terms of the contract, have a set-off for the value of medicine furnished the seaman, as was done in *Harden v. Gordon*, 2 Mason, 559; or that the seaman had agreed that the wages should not become due until three months after the end of the voyage, when of course the ship would have gone to sea again, as in the case of *The Express*, B. & H. 608; or that the contract was in the form used by *The George Home*, 1 Hagg. 378, of which Lord Stowell said: "It would take me up a very inconvenient time to point out half the impertinences with which it is stuffed, and which it is high time should be corrected." A seaman would surely have great cause to complain of the law that would permit his creditor, against his will, to submit questions like these to a court of law, which, according to Lord Lyndhurst, can find "no principle by which a contract entered into by mariners is to be construed differently from those made by other persons." *Jesse v. Roy*, 1 Crompt. M. & R. 316. See, also, *Webb v. Duckingfield*, in this state, 13 Johnson, 390, and *Goodrich v. Peabody*, in the state of Massachusetts, 2 Dane, Abr. 462.

Furthermore, the contract of the mariners is a species of partnership, (Emerigon.) "It is not, indeed, a partnership as to all the effects of that contract, but as to some of its consequences." *Ware, J., Skolfield v. Potter*, 2 Davies, 401. "In the common sense and equity of the case, the crew and the vessel have a joint or partnership interest in freight, and, independent of positive regulation, special contract, or a usage that has the force of law, no distinction can be made

between the title of the crew to the freight and that of the vessel or owners. It is in its own nature as perfectly a joint or partnership interest as can be conceived. These opinions expressed are not new." *Ware, J., The Brig Spartan*, 1 Ware, 139. But it has been held that when a garnishee was sought to be charged on the ground that he was indebted to the defendant in respect of a partnership which had existed between them, but the accounts of which had not been settled, the proceeding could not be sustained. *Burnham v. Hopkinson*, 17 N. H. 259. Whether, in this present case, the freight earned by these seamen has been collected or not, we do not know. If the freight has not been collected, the seaman must lose his interest in it, if the garnishment of the owner's debt for the wages holds good. If it has been collected, it is held by the owners in trust for the seaman *pro tanto*. And, inasmuch as the trust cannot be enforced in the second district court of Bristol county, to uphold the attachment is to overthrow the trust. "Garnishment can have no effect to overthrow trusts." Drake on Attachments, § 454h.

In regard to the garnishment of a legacy, which is a sum of money payable out of the estate, subject to chancery jurisdiction, where the executor is treated as trustee of the estate for the benefit of those interested in it, it has been held to be exempt from attachment, because of the great inconvenience and manifest incongruity attending the application of the law of garnishment in such cases. "Seamen are emphatically the wards of the admiralty, and, although not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs dealing with their expectancies, and *cestui que trusts* with their trustees." *Story, J., Harnden v. Gordon*, 2 Mason, 541. The rights of seamen, by virtue of the contract of hire, are those of a *cestui que trust*, of a mortgagee, of a part owner of the freight. They have privileges, personal in their nature, conferred by the law and upheld everywhere upon grounds of public policy. Caumont, Dict. Droit Maritime, 677, title "Gens de Mer." If great in-

convenience and manifest incongruity attending the application of the law of garnishment are reasons for exempting any demands from garnishment, those reasons are as weighty in a case of this as of any other character. Says the court in *Hussie v. G. L. U. Congregation*, 35 Cal. 378: "If we admit that the equitable rights of the defendant can be reached in that way, we must go to the length of holding that our justice's courts can take cognizance of them, and must be called upon to ascertain and condemn them to the use of the plaintiff, however difficult the undertaking may be, and however inadequate the powers of those courts." So here, if it be held that an assignment of the seaman's contract to his creditor can be effected by the process of garnishment, and the contract enforced for the creditor's benefit, by the second district court of the county of Bristol, we must go the length of holding that that court can scrutinize the contract and reforms its terms—can enforce the security attached to it, by process *in rem* against the ship—can settle the partnership account in regard to the freight. This seems to be the inevitable result of upholding the attachment, and it is conclusive against the existence of a right to attach the wages by process of a court of law.

Having thus endeavored to show that seamen's wages, whether earned in the coastwise trade or otherwise, are not subject to garnishment at the instance of a creditor in an action at law, I proceed to consider the effect of the fact stated in the supplemental answer, namely, that in the suit brought by Eddy the state court arrived at the opposite conclusion, and directed that the libellant's wages be applied to the payment of Eddy's demand. According to the claimant's contention, that adjudication of the state court is binding upon this court, and is conclusive of the claimant's right to a dismissal of this libel, so far, at least, as concerns the wages of the libellant Hare. But such is not my opinion. The adjudication of the state court in the suit of Eddy, although to be treated with all respect, is without binding effect in the present proceeding, and does not relieve this vessel from liability to the present proceeding. The libellant was no party

to the suit in the state court, for he was never served with process, and never appeared.

The Old Colony Steam-boat Company, who were the garnishees in the state court, are not defendants here, for this is a proceeding *in rem* against the vessel. The Old Colony Steam-boat Company is simply a claimant in this proceeding, entitled to defend the vessel, because of the fact that the vessel when seized was owned by that corporation, but not liable to a personal judgment, unless upon a stipulation for value standing in place of the vessel, if such a stipulation has been given, of which the pleadings convey no information. The proceeding in the state court was also a proceeding *in rem*. When a defendant is not served with process, the proceeding by garnishment "is to be treated to all intents and purposes as a mere proceeding *in rem*." Story, Conflict of Laws, § 549; Drake on Attachments, § 474. The validity of the judgment rendered by the state court depends, therefore, upon the question whether that court acquired jurisdiction over the thing proceeded against, namely, the libellant's wages. That question is open to be passed on by this court, because it pertains to the jurisdiction, (*Thompson v. Whitman*, 18 Wall. 457,) and it is disposed of by the conclusion already arrived at, that the garnishment of seamen's wages is forbidden by the law. In *Hastings v. Farmer* the validity of a judgment against an Indian was considered by the court of appeals of this state, and the court say: "Farmer was served, but the service was prohibited by law, and therefore illegal and void. It was no service, and the justice had no jurisdiction." In *Taylor v. Carryl*, 20 How. 583, a decree against a vessel seized by the marshal, but found by the supreme court of the United States to be exempt from seizure, was by that court held void.

Moreover, the answer under consideration does not state that the Old Colony Steam-boat Company has paid the libellant's wages to Eddy, the attaching creditor; on the contrary, the judgment of the state court has been appealed from. *Non constat* that the wages will ever be paid to Eddy. "Where it does not appear that execution has been awarded

against the garnishee, and that he has been called on or compelled to pay, it is not such a payment, merger, or discharge of the original debt as to be pleaded in bar." *Moriam v. Rundlett*, 13 Pick. 511. Here the plea is in bar, and upon the authority just cited must be held insufficient.

But, in proceedings like the present, the result of an abatement of the action is substantially the same as the result of a bar. At the termination of the voyage the seaman and the ship are in the same port at the same time; if his suit, then commenced, be abated, the value of the seaman's lien is reduced to a matter of mere chance, for, if the ship be allowed to depart, no one can say when, if ever, the seaman and the ship will meet again in port. The ship may never return, or, if she does, may prove to have meanwhile been condemned and sold in some subsequent proceeding *in rem*. In some actions at law the difficulty arising from a prior garnishment of the debt sued on has been obviated by permitting a recovery, upon the condition that the plaintiff pay or secure the debt of the attaching creditor. No such condition is possible in cases of seamen,—a class so necessitous that an advance of future earnings has become a rule of the merchant service,—and it is a rule of the courts never to require security for costs of them, wanderers although they are. In other actions at law judgment has been rendered, but execution stayed until the debt of the attaching creditor has been satisfied or secured. Such a course is impossible in this class of cases, for the ship cannot be detained at the wharf subject to judgment. These and other similar considerations, that will readily occur to the mind, serve to show the extent of the inconvenience and incongruity attendant upon the application of a rule that permits the garnishment of seamen's wages in an action at law.

In conclusion, I may add that the rule exempting wages from garnishment springs out of the sharp necessity which the nature of his calling casts upon the seaman when he leaves his ship. A seaman is compelled to be improvident. While at sea the ship is his house, and his daily bread he

must receive from the hands of the ship's master. His wages cannot be paid him day by day, but must be allowed to accumulate in the hands of an unknown owner. When the voyage is over he must at once provide himself with temporary shelter and with food, and for that purpose he must have money in his hand. Therefore it is that his wages are nailed to the ship, and therefore it is that, as in the ancient days of the Consolato, so now, the law is forced to declare that no man can be permitted to say anything or do anything to deprive the seaman of the right to demand his wages when he leaves the ship.

Upon these grounds the exceptions to the answer are allowed.

McNALLY v. THE STEAM-TUG L. P. DAYTON, THE STEAM-TUG
JAMES BOWEN, and the float or scow called
"NUMBER FOUR."

(Circuit Court, S. D. New York. November 9, 1880.)

1. COLLISION—NEGLIGENCE—BURDEN OF PROOF.—A libel for collision alleged negligence on the part of the tugs Dayton and Bowen and the scow Number Four. The answer of the Dayton alleged that the collision was wholly caused by the fault of those on board and in charge of the Bowen and the scow, "as alleged in the libel." The answers of the Bowen and the scow alleged that the collision was due wholly to the fault of those managing the Dayton and the boats in her tow. *Held*, that these admissions by the Dayton upon the one hand, and the Bowen and the scow on the other, would not throw on either of the libelled vessels, as between such vessel and the libellant, the burden of showing fault in the other.
2. SAME—SAME—SAME.—*Held, further*, that there must be *prima facie* evidence of negligence, in such case, in order to throw the burden of proof upon either of the libelled vessels.
3. SAME—SAME—SAME.—*Held, further*, that the mere fact that the injured boat was lashed to the side of the Dayton, without motive or steering power, and the absence of any allegation of fault against her in the answers filed, did not *prima facie* establish any fault in any particular one of the vessels libelled.

4. **SAME—SAME—SAME.**—*Held, further,* that, although it might be the proper conclusion from the pleadings in such case that some one or two, or all of the three vessels sued, must have been in fault, it is for the libellant to show which one, and not for any one of the three to exculpate itself, or prove fault in either or both of the other two.
5. **SAME—SAME—SAME.**—The answer of the Dayton alleged that the Dayton and Bowen were approaching in such a way that the proper course was for each to pass on the starboard side of the other; that the Dayton took the proper measures to pass in that manner, and the proper signals were blown, but that the Bowen failed to give heed to said signals, and to take measures to pass on the starboard hand of the Dayton and the boats in her tow. *Held,* that this did not show any negligence in the Dayton, in the absence of any allegation to the contrary in the libel.
6. **SAME—SAME—SAME.**—The answers of the Bowen and the scow each alleged that at the time the Dayton and her tow were discovered coming down the river, by the pilot of the Bowen, the green light of the Dayton was visible, and she appeared to be going between the Bowen and the New York shore, which was then about 300 yards distant; that at a proper distance the Bowen blew two blasts, to which the Dayton responded by two blasts, and the Bowen thereupon starboarded, heading as far to the westward as she could safely do without danger of colliding with another tug and tow on her port side, heading in the same direction; that the Dayton, instead of keeping her course, or starboarding so as to pass on the starboard side of the Bowen, so changed her course as to shut out her green light and show her red light to the Bowen; that thereupon, it being evident that the Dayton could not cross the bow of the Bowen and of the scow without imminent danger of collision, the Bowen slowed, stopped, and backed, and that at the time of the collision the headway of the Bowen and the scow was about stopped. *Held,* that there was nothing in any of these averments which made out a *prima facie* case of negligence against the Bowen or the scow.

E. D. McCarthy, for libellant.

W. D. Shipman, for the Bowen and the scow.

Carpenter & Mosher, for the Dayton.

BLATCHFORD, C. J. In this case I find the following facts as between the libellant and the claimant of the steam-tug L. P. Dayton, such facts being found from the libel and the answer of said claimant, no testimony being put in on the part of either of said parties:

On the fourteenth of February, 1879, the boat Centennial, of the burden of about 300 tons, and of which the libellant was master, was taken in tow by the steam-tug L. P. Dayton,

at the pier foot of Fifty-ninth street, New York, to be towed to the Erie basin, at about 5:30 P. M. The said boat was loaded with a cargo of wheat. When the Dayton left Fifty-ninth-street pier she had in tow four boats, two on each side. The Centennial was the inside starboard boat; that is, the one lashed to the starboard side of the Dayton. She was 103 feet in length, and her bow projected some 20 feet beyond the bow of the Dayton. The evening was clear and starlit, and the tide ebb. The Dayton landed one of the boats which had been on her port side at the Eagle pier, Hoboken, and thereafter pursued her course with the remaining three boats. When about opposite or a short distance above pier 1, North river, and about 300 yards from the piers on the New York shore, the Centennial was run into by the scow Number Four, which was then in tow of the steam-tug James Bowen, and received such injuries that she sank, with her cargo. The Number Four was lashed to the port side of the Bowen, and the two were proceeding from a point in the East river to the Long dock, Jersey City. At the time of the collision the Bowen was on a course opposite or nearly opposite the course then being taken by the Dayton and her tow. The Centennial was under the control and subject to the direction of the Dayton, having neither propelling nor steering power of her own.

On the foregoing facts I find, as a conclusion of law, that as the libel alleges that the Dayton was negligent and in fault in various particulars specified in the libel, and as the answer of the claimant of the Dayton denies each of said allegations of fault on the part of the Dayton, and as no facts are proved in the case as against the Dayton, except the foregoing facts admitted by said answer, and the libellant has proved no negligence or fault on the part of the Dayton, the libel must be dismissed as to the Dayton, with costs to her in this court, and with \$24.25 costs to her in the district court, against the libellants.

In this case I find the following facts as between the libellant and claimant of the steam-tug James Bowen, such facts

being found from the libel and the answer of said claimant, no testimony being put in on the part of either of said parties.

On the evening of the fourteenth of February, 1879, the steam-tug James Bowen took in tow in the East river the scow Number Four, the scow being lashed to the port side of the Bowen. The Bowen and the scow were bound to the Long dock, Jersey City. The tide was ebb. The Bowen and the scow proceeded down the East river to the Battery, and rounded the Battery. At a point about opposite pier 1, North river, and about 300 yards distant from the New York shore, the bow of the boat Centennial, which was being towed by the steam-tug L. P. Dayton on the starboard side of the Dayton, and was going down the North river, came into collision with the bow of the said scow Number Four, and the effect was that the Centennial sank.

On the foregoing facts I find, as a conclusion of law, that, as the libel alleges that the Bowen was negligent and in fault in various particulars specified in the libel, and as the answer of the claimant of the Bowen denies each and every allegation in the libel charging or imputing any fault or negligence to the scow or the Bowen, or those in charge thereof, and as no facts are proved in the case as against the Bowen, except the foregoing facts admitted by said answer, and the libellant has proved no negligence or fault on the part of the Bowen, the libel must be dismissed as to the Bowen, with costs to her in this court, and with \$23.95 costs to her in the district court against the libellant.

In this case I find the following facts as between the libellant and the claimant of the scow Number Four, such facts being found from the libel and the answer of said claimant, no testimony being put in on the part of either of said parties:

On the evening of the fourteenth of February, 1879, the steam-tug James Bowen took in tow, in the East river, the scow Number Four, the scow being lashed to the port side of the Bowen. The Bowen and the scow were bound to the

Long Dock, Jersey City. The tide was ebb. The Bowen and the scow proceeded down the East river to the Battery, and rounded the Battery. At a point about opposite pier 1, North river, and about 300 yards distant from the New York shore, the bow of the boat Centennial, which was being towed by the steam-tug L. P. Dayton on the starboard side of the Dayton, and was going down the North river, came into collision with the bow of the said scow Number Four, and the effect was that the Centennial sank.

On the foregoing facts I find, as a conclusion of law, that, as the libel alleges that the scow was in fault in particulars specified in the libel, and as the answer of the claimant of the scow denies each and every allegation in the libel charging or imputing any fault or negligence to the scow or the Bowen, or those in charge thereof, and as no facts are proved in the case as against the scow except the foregoing facts admitted by said answer, and the libellant has proved no negligence or fault on the part of the scow, the libel must be dismissed as to the scow, with costs to her in this court, and with \$23.25 costs to her in the district court against the libellant.

The answer of the Dayton alleges that this collision was wholly caused by the fault of those on board and in charge of the Bowen and the scow, "as alleged in the libel." This admission by the Dayton certainly can have no effect to throw on the Dayton, as between her and the libellant, any burden of showing fault in the Bowen and the scow. The libellant and the Dayton agree that there was fault in the Bowen and the scow. But when it comes to making proof of such fault, which proof must be made as against the Bowen and the scow to condemn them, they having denied the libellant's allegation of fault in them, and the libellant having initiated such allegation of fault in them, the libellant must go forward and prove such allegation, or else his libel must be dismissed as to the Bowen and the scow. It is of no consequence that such allegation is admitted in the answer of the Dayton. So, also, the allegation in the answer of the

Bowen and in the answer of the scow, that the collision was due wholly to the fault of those managing the Dayton and the boats in tow of her, is only an admission of an allegation made in the libel as respects the Dayton, and can have no effect to throw on the Bowen or the scow, as between either of them and the libellant, any burden of showing fault in the Dayton.

Whatever cases are found, where, on a libel filed by a vessel at anchor, or lying at a pier, or in stays, against a vessel colliding with her, it has been held that the mere fact of a collision by a vessel with another one thus helpless is *prima facie* evidence of negligence and fault in the former, and throws on her the burden of proof, such doctrine does not apply to this case, even though the Centennial was helpless, lashed to the side of the Dayton, and having no motive or steering power. There must, in all cases, be *prima facie* evidence of negligence. There is none in this case, as between the libellant and any one of the three vessels sued. The Centennial was in motion with the Dayton. Her helplessness, and even the absence of any allegation of fault against her, does not establish *prima facie* any fault in any particular one of the three vessels sued. Even though it may be the proper conclusion from the pleadings that some one or two, or all of the three vessels sued must have been in fault, it is for the libellant to show which one, and not for any one of the three to exculpate itself, or prove fault in either or both of the other two. In an admiralty suit between two parties only, for a collision, the rule in England seems now to be that the burden of proof is not on the claimant, even when he sets up matter strictly justificatory or excusatory, until a *prima facie* case of negligence is shown.

In *The Marpesia*, L. R. 1 Privy Council Appeals, 212, in 1872, inevitable accident was set up as a defence by the claimant in a collision case, and it was held that in such a case the burden of proof lies, in the first instance, on him who brings the suit, and does not attach to the vessel sued until a *prima facie* case of negligence is shown.

In *The Abraham*, 2 Aspinall's Mar. Law Cases, N. S. 34, in

1873, the suit was against an overtaking vessel, which was bound to keep out of the way. The answer admitted the overtaking, and set up inevitable accident by the entangling of the rudder chains of the overtaking vessel. The plaintiffs contended that on these pleadings the defendants ought to begin, while the defendants contended that the plaintiffs ought to show a *prima facie* case. This was on the view that the pleadings did not show a *prima facie* case of negligence, although the overtaking vessel was bound to keep out of the way. Sir Robert Phillimore, following *The Marpesia*, held that the plaintiffs must begin.

In *The Benmore*, L. R. 4 A. & E. 132, in 1873, the answer made no charge of negligence against the plaintiffs, but denied generally the averments of the petition, and pleaded inevitable accident. The case was one of a collision between two sailing vessels, and it appeared from the pleadings that the vessel sued was on such a tack that she was bound to keep out of the way of the other vessel. Sir Robert Phillimore held that it had been the practice to call on the defendants to begin in cases where no charge of negligence was made against the plaintiff, and the only defence raised on the pleadings was inevitable accident, but that on the decision in *The Marpesia* the plaintiffs must begin.

As respects the Dayton, no *prima facie* case of negligence on her part is shown by her answer. The fact that the collision occurred while the Centennial was under the control and direction of the Dayton, and had neither propelling nor steering power of her own, is not *prima facie* evidence of negligence in the Dayton. The answer of the Dayton alleges that the Dayton and the Bowen were approaching in such a way that the proper course was for each to pass on the starboard side of the other; that the Dayton took the proper measures to pass in that manner, and the proper signals were blown, but that the Bowen failed to give heed to said signals, and to take measures to pass on the starboard hand of the Dayton, and the boats in her tow. There is nothing to the contrary of this alleged in the libel, and this does not show any negligence in the Dayton. The answers of the Bowen and the

scow are no evidence against the Dayton. Even under the most stringent rule, if the Dayton alone were sued, the burden of proof to show negligence in her would, on the libel and her answer, be on the libellant.

As respects the Bowen and the scow no *prima facie* case of negligence is shown as to either of them by her answer. The answer of each alleges that at the time the Dayton and her tow were discovered coming down the river by the pilot of the Bowen the green light of the Dayton was visible, and she appeared to be going between the Bowen and the New York shore, which was then about 300 yards distant; that at a proper distance the Bowen blew two blasts, to which the Dayton responded by two blasts, and the Bowen thereupon starboarded, heading as far to the westward as she could safely do without danger of colliding with another tug and tow on her port side, heading in the same direction; that the Dayton, instead of keeping her course or starboarding so as to pass on the starboard side of the Bowen, so changed her course as to shut out her green light and show her red light to the Bowen; that thereupon, it being evident that the Dayton could not cross the bow of the Bowen and of the scow without imminent danger of collision, the Bowen slowed, stopped, and backed, and that at the time of the collision the headway of the Bowen and the scow was about stopped. There is nothing in any of these averments which makes out a *prima facie* case of negligence against the Bowen or the scow. It is urged for the libellants that the answer of the Bowen shows that she had the Dayton on her starboard side, with the courses of the two vessels crossing so as to involve risk of collision, and that, therefore, under rule 19 of section 4233 of the Revised Statutes it was the duty of the Bowen to keep out of the way of the Dayton, and as she did not a *prima facie* case of negligence is thus made out against her by her answer. This is an error.

The facts stated in the answer of the Bowen do not show that the courses of the two tugs were crossing when the Bowen discovered the Dayton. On the contrary, the green light of the Dayton was then outside to the Bowen, and not

to her red light, and the Dayton appeared to be going between the Bowen and the New York shore, to the eastward, and in a direction which would cause her green light to still be visible to the Bowen, and her red light to be still invisible. This would insure safety and no collision; and to insure it still more the Bowen blew two whistles, and the Dayton answered with two whistles. After that the Bowen starboarded. Even if, before so starboarding, and while so starboarding, the Bowen is to be considered as having the Dayton on her starboard side, with the courses of the two vessels crossing, (which is by no means clear on these averments in the answer of the Bowen,) her answer shows that she took proper measures to keep out of the way of the Dayton; that such measures were assented to at the time by the Dayton as proper; and that then the Dayton changed her course and went across the bow of the Bowen. Under these circumstances the Bowen slowed, stopped, and backed. The answer of the Bowen states, substantially, that there was imminent danger of collision if she kept on. There is nothing in all this to show negligence in the Bowen. When the Dayton so came suddenly across the bow of the Bowen a case was not made within rule 19, although in that position the Bowen had the Dayton on her starboard side, and their courses were crossing; and, even if it were, the answer shows that the Bowen did all she could to keep out of the way of the Dayton. The libel, so far from alleging that it was a fault in the Bowen to slow, stop, and back, alleges as a fault in her that she did not reverse, or did not do so soon enough. The isolated fact of her slowing, stopping, and backing cannot be taken away from the connection in which it is found in the answer, and separated from the circumstances under which the answer states it occurred, particularly as the libel states distinctly that it was a fault in her not to reverse.

It is urged that it works injustice to the libellant to compel him to prove anything, because all his proof to inculpate one tug must exculpate the other. But that is a position in which he has placed himself, if it exists. In his libel, however, he alleges specific faults against each tug, and on them claims

that each tug is in fault. The gravamen of the libel is that both tugs were to blame, and of course that showing one in fault will not show the other to be free from fault.

Not only did the libellant introduce no evidence in the district court, but he has introduced none in this court, although the appeal states that he intends to have the case heard in this court on proofs and testimony. As no case of negligence is made out against any one of the three vessels sued, the libel must be dismissed as to each.

HARDY v. MOORE.

(District Court, S. D. New York. November, 1880.)

1. PRACTICE.—Where an *alias* process was issued pursuant to an order of the court, on proof by affidavit that it acquired no jurisdiction under the original process, *held*, that this, in effect, vacated an interlocutory decree granted in proceedings under the original process to which a return had been made, which, if true, showed that the court had acquired jurisdiction; that, although the entering of an order vacating the decree would have been more regular, failure to do so did not render the *alias* process void.
2. SIGNING LIBEL.—Process issued on a libel sworn to by one of the proctors as attorney in fact, but unsigned except by the proctors by their firm name, is not void. The failure of the libellant or his agent to sign is, in such case, a defect amendable, but until amendment has been allowed the libel must be considered as still unsigned, though the proctor who swore to it as attorney in fact afterwards, but without leave of the court, signed the same.
After judgment the court is bound to overlook this defect.
Rev. St. § 3954.
3. NAME OF LIBELLANT.—Naming the libellant by the initials of his Christian name does not prejudice the defendant and is immaterial, though it seems so to name the defendant, in publication under an order of attachment, would vitiate the attachment.

Frank v. Levie, 5 Rob. 599.

In Admiralty. Order to show cause.

On September 29, 1880, a libel was filed with prayer for process *in personam* and clause of foreign attachment. The process was accordingly issued, and on October 5th was re-

turned with the marshal's indorsement that he had been unable to find the respondent, but had attached the credits and effects of the respondent in the hands of a garnishee. An interlocutory decree and order of reference were then entered on their default. Shortly after the said process was issued it was discovered that the libel, though sworn to, had not been signed except by the proctors as proctors. It was then signed, without permission of the court, by one of the proctors in behalf of the libellant, who had sworn to it as attorney in fact. Subsequently, on October 15th, on affidavit of one of the proctors, setting forth that when the said process was served the garnishee had no credits or effects of the respondent, but that it now holds such credits and effects acquired since that time, an *alias* process was directed by the court to issue, and an attachment was again levied by the marshal on the credits and effects of the respondent in the hands of the garnishee. On the return-day of this second process neither the respondent nor the garnishee appeared, and a second interlocutory decree and order of reference to a commissioner were entered. Testimony was taken before the referee, his report made and filed, costs taxed, and the final decree entered October 20th. On October 25th an order to show cause on affidavit was granted to the proctor for the respondent why the final decree and the process should not be vacated, or, if not vacated, why the respondent should not be allowed to appear herein and answer, etc.

Samuel W. Weiss, for respondent.

Beebe, Wilcox & Hobbs, for libellant.

CHOATE, D. J. The return of the marshal to the process shows that he made diligent search for the principal defendant and could not find him. The moving affidavits raise such question of the truth of this return that if it were material an inquiry would be ordered. But I think the order of the court that an *alias* issue, made on proof by affidavit that the court had acquired no jurisdiction by reason of having made no attachment, must be deemed to have vacated in effect the first interlocutory decree. It treats that decree as a nullity. It would have been proper and more regular to have entered

an order at the same time vacating the decree, but the failure to do so does not, I think, make the *alias* process void or irregular. The information the libellant's proctor had when he applied for an order that process with foreign attachment issue, was such as to authorize it; and there is nothing to show a want of good faith on his client's part in failing to communicate to his proctor all that he knew about the principal defendant's residence and place of business. The issue of the *alias* process was justified by the state of the facts existing when it issued, and it was duly served. Therefore, the question raised as to the service of the original process is immaterial. The libel should have been signed before process issued. It appears to have been signed by "Beebe, Wilcox & Hobbs" as proctors, and verified, as appears by the officer's certificate. I do not think the failure of Mr. Beebe to sign it, which on the affidavits seems to be admitted, made the process void. It was a defect which would have been cured by amendment. But no amendment having been allowed, the libel must be considered as still unsigned except by "Beebe, Wilcox & Hobbs" as proctors. I think if it was in fact verified, and that appears by the certificate, this is a defect the court is bound to overlook after judgment. Rev. St. § 954.

The libellant being named by his initials is immaterial. It does not prejudice the defendant. It might be quite otherwise if an attempt were made to publish against a defendant by his initials. He might be prejudiced thereby and the notice insufficient. *Frank v. Levie*, 5 Rob. 599.

Neither the principal nor the garnishee show any very good reason for not appearing. The garnishee appears to have supposed that it need not appear in obedience to the first process because it had no funds. It was so advised. This is the very reason why it should have appeared. It supposed it had funds when the second process was served, but now finds that another person claims the funds. I think, therefore, its default should be opened. The principal defendant appears to have had a proctor retained to attend to the business all the time, and why no appearance was entered does not appear, unless it was because the whole proceeding was regarded as

void on account of the defect in the libel, which was an error, as I think. But he now shows that he may have a defence on the merits.

Default opened as to principal defendant and garnishee, on paying the fees and expenses paid upon the reference; the principal defendant to file his answer, setting up defence referred to in his affidavit, within five days after entering order on this memorandum, and stipulating that the issues be referred to a commissioner for trial; either party, however, being at liberty to make any application to the court that he may be advised, in consequence of the libel being unsigned except by "Beebe, Wilcox & Hobbs," proctors, on one day's notice.

SMITH v. STEAMER JOSHUA LEVINES.

(District Court, S. D. New York. December 28, 1880.)

1. WAGES—INTOXICATION—EVIDENCE.

C. H. Williams, for libellant.

C. E. Crowell, for claimant.

CHOATE, D. J. This is a suit for wages during the years 1877, 1878, and 1879. The libellant alleges a special agreement to pay him \$100 a month during the time the vessel was running. He served as engineer and fireman. The promise to pay the libellant \$100 a month is proved, but the claimant has attempted to show that he was so intoxicated when he made the promise that he did not know what he was doing. I think the weight of the testimony is against the claimant on this point, and the libellant is entitled to recover his wages at that rate. His wages amount to \$2,030 between September 1, 1877, and February 11, 1879. He admits that the claimant is entitled to credits, which reduce the amount to \$810.29, for which sum, with interest from February 11, 1879, with costs, the libellant is entitled to a decree.

THE SCHOONER MARY CHILTON.

(District Court, S. D. New York. November, 1880.)

1. ADMIRALTY—ESTOPPEL—MARITIME LIEN.

Where the claimant (owner) of the vessel, who personally contracted with the libellant for repairs made at his dock in Brooklyn, New York, resided at the time, and had long before resided, in New York city, and the vessel at the time was registered at New London, Connecticut, and had "New London" painted on the stern, and the owner informed libellants that she was registered there, was mortgaged, and that he could ascertain about her from the collector there:

Held, that these facts did not import a representation that the claimant lived in New London.

That while the owner, if he has misled the libellant by representations as to the vessel being foreign or domestic, may be estopped to deny such representations,

(*The E. A. Barnard*, 2 FED. REP. 712, 716.)

Still the libellant does not appear to have been misled by them.

The libellant, knowing that the claimant had bought the vessel, was bound to inquire as to his place of residence.

That the vessel, being in the port where her owner resided when the repairs were made, was a domestic vessel, and no lien attached by the maritime law.

The Albany, 4 Dill. 439.

That no lien therefor attached under the laws of New York, the necessary specifications not having been filed.

In Admiralty.

Robert Payne, for libellant.

W. W. Goodrich, for claimant.

CHOATE, D. J. This is a suit for labor and materials furnished in repairing the schooner Mary Chilton. The repairs were put upon her at the libellant's dock in Brooklyn. The libel claims: lien therefor both by the maritime law and by the state law.

As to a lien by the state law there is no proof that the libellant filed the necessary specification. As to a general maritime lien it is shown that the owner of the vessel, who personally contracted with the libellant for the repairs, then and long before resided in New York city. The vessel had been registered at New London, Conn., and "New London" was painted on her stern when the vessel came to the libel-

lant's dock. The owner also informed libellant that she was registered at New London, and that there was a mortgage on her, and that he could ascertain about the vessel by telegraphing to the collector there. The vessel being in the port where her owner resided was a domestic vessel, and no lien attached for the repairs by the maritime law. *The Albany*, 4 Dill. 439. If the owner misled the libellant as to her character, as being foreign or domestic, he may be estopped to deny his representations as to her character. *The E. A. Barnard*, 2 FED. REP. 712, 716. It is claimed by the libellant that there is such an estoppel in this case. I cannot find, however, that the libellant was misled by any representation of the owner as to his residence, or as to the character of the vessel. The libellant was informed that the claimant had bought the vessel, and he made no inquiry as to claimant's place of residence. I do not think that the name "New London" painted on the stern, or the information that the vessel was registered there, were or imported a representation that he lived there. The proper inference to be drawn from what the libellant was told was rather that the vessel had once belonged to somebody who lived in New London, but that now she belonged to this claimant. The libellant had no reason to suppose that the claimant did not live in New York, and on inquiry he would have ascertained that he did live here. I think the facts do not warrant the conclusion that the claimant is estopped to make this defence.

Libel dismissed with costs.

**BUCK and others v. PIEDMONT & ARLINGTON LIFE INS. Co.
and others.**

(Circuit Court, E. D. Virginia. December 23, 1880.)

1. JURISDICTION OF FEDERAL COURT—BILL FILED IN STATE COURT—
SUIT NOT AT ISSUE.—On November 30, 1880, the defendant corporation, an insolvent life insurance company, doing business at Richmond, Va., and having policies distributed in many states of the union, by order of its board of directors, but without any previous authority from its stockholders, conveyed all its property to its vice-president in trust, for the benefit of creditors, subject to certain conditions and preferences, duly set forth in the deed creating said trust.

On December 3, 1880, the trustee set on foot a suit in the chancery court of Richmond, asking the aid of that court in the administration of his trust.

On the same day a resident creditor filed a bill in his own name, in the same court, against the defendant company and the said trustee, and asked leave therein to subsequently make all the directors and stockholders parties to the suit, when their names should be thereafter ascertained. This bill also asked for all proper accounts and a receiver, and that all the creditors might be ascertained, the fund collected and distributed, and the trust deed set aside; and further asked for a personal decree for the amount paid the company by the complainant, on the ground that the company had forfeited its contract by refusing to give the complainant a paid-up policy in exchange for his original policy.

On December 11, 1880, the complainants, non-resident creditors, exhibited their bill in this suit, to which they made the company, the trustee, and the stockholders all parties defendant, and asked, in the name of themselves and of all creditors who might come in, that the trust deed should be set aside, the funds collected and distributed, a receiver appointed, and for all the general and special relief usually asked for in creditors' bills.

A rule was thereupon made by this court, calling upon these defendants to show cause, December 20th, why a receiver should not be appointed. It further appeared, upon the return-day to this rule, that the bill of the trustee had never been filed in the state court; that the cause had not proceeded to issue in either of the suits in that court; and that such court had not appointed a receiver, or taken custody of the effects of the defendant company, or made any order by which it took cognizance or assumed jurisdiction of the controversy between the parties to the respective suits. *Held*, under these circumstances, that the institution of the mere incipient steps of the two suits in the state court would not defeat the jurisdiction of this court.

2. RECEIVER—INSOLVENT LIFE INSURANCE COMPANY.—*Held, further*, that the insolvency and assignment of the defendant company, and the action of the trustee in applying to the state court for aid in the administration of his trust, exhibited all the conditions requisite to authorize this court to immediately appoint a receiver, in accordance with the application of the complainants.
3. SAME—TRUSTEE OF INSOLVENT COMPANY.—*Held, further*, that this court would not appoint such trustee and former vice president the receiver of the insolvent company.
4. FRAUD—INSOLVENT LIFE INSURANCE COMPANY—PROOF.—The mere fact of the failure of a life insurance company would seem to be *prima facie* proof that its operations have been conducted in a fraudulent manner; and, if the failure is not explained by some great casualty, such as a wide-spread pestilence, or sudden financial convulsion, or physical calamity, it would seem to be *per se* proof of fraud.
5. CONSTRUCTIVE FRAUD—MANAGERS OF COMPANY.—Such failure does not necessarily create a presumption of moral turpitude in the managers of the company, but it certainly does create a presumption of financial imbecility, or recklessness, or extravagance, or that gross negligence, which is equivalent in its consequences to fraud, and which a court is bound to regard as constructive fraud.

In Equity.

The facts of the case, so far as they bear upon the points of law decided, are recited in the opinion.

Ould & Carrington and R. L. Maury, for complainants.

John O. Steger, W. W. Crump, Hundley & Hunter, Sands, Carter & Leake, Keen & Davis, and others, for defendants.

HUGHES, D. J. The defendant in this cause, the Piedmont & Arlington Life Insurance Company, is avowedly insolvent, and, on the thirtieth day of November ultimo, its president, vice-president, and secretary, by order of its board of directors, and without previous authority from its stockholders, made a deed of assignment, by which it granted, set over, and assigned to its vice-president, Angus R. Blakey, all its bonds, bills, notes, choses in action, and evidences of debt of every description; all its judgments, decrees, and liens; its mortgages, deeds of trust, and securities; all its office furniture in Richmond, including desks, tables, carpets, stoves, iron safe, and other apparatus; and all its lands, lots, tenements, and parcels of real property lying in the states of Virginia, West Virginia, Tennessee, South Carolina, Arkansas,

Texas, and Florida,—in trust for certain purposes set out in the trust deed, which describes in detail the lands conveyed.

The deed gives the trustee power to sell, dispose of, and convey the said effects for cash or on such credits as he may choose, and with the proceeds to pay, first, two classes of preferred creditors, one class prior to the other; and, afterwards, to secure to the policy-holders of the company, and beneficiaries under policies issued by it, the equitable value of their policies, as of the date of the deed, discriminating the policy-holders in the states of Kentucky, California, and Maryland from those in other states of the Union; and preferring those policy-holders who may be "satisfied" with the equitable values ascertained by the trustee, over those who may be "not satisfied." By this deed the directors put the affairs of the company in liquidation, and, by necessary effect, terminated the existence of this corporation, *as a life insurance company.*

On the eleventh day of this month the complainants, who are non-residents, exhibited their bill in this court, in which they charge that the defendant company is insolvent; that its deed of the 30th ultimo is fraudulent, and was intended to hinder and delay creditors, and was made without authority of the stockholders; and, among other things, they pray for the appointment of a receiver, and for the setting aside of the trust deed as null and void. A rule was made by this court on the eleventh instant calling upon the defendant company and the said Blakey, trustee, to show cause here, on the twentieth instant, why a receiver should not be appointed.

The company and Blakey appeared on the twentieth instant, and, in the form of two pleas, denied the jurisdiction of this court to entertain this suit. One of the pleas set out, as defeating this jurisdiction, in substance, the fact that the said Blakey had on the third instant set on foot a suit in the chancery court of Richmond asking the aid of that court in administering his trust, involving the subject-matter of the suit here; but it has been shown that the bill of Blakey has not yet been filed in the said state court. The other plea to

the jurisdiction of this court set out the fact, in substance, that one C. B. Maury had on the third instant set on foot a suit in the said chancery court of Richmond, and exhibited his bill there against the defendant company and Blakey, the trustee, for purposes similar to those sought by the proceeding in this court. It has been shown that in neither of the two suits in the chancery court of Richmond has the cause proceeded to issue; that those suits are still at rules; that that court has not appointed a receiver or taken custody of the *res*,—that is to say, the effects of the defendant company,—or made any order by which it took cognizance or assumed jurisdiction of the controversy between the parties to the respective suits; and that the parties there are not the same as the parties to the suit here. It has been shown that the nature and objects of the suits in the chancery court of Richmond are different from those of the suit here. The Maury bill is filed in his own name alone, although he asks for all proper accounts, for a receiver, and that all creditors may be ascertained, the fund collected and distributed, and the deed set aside. It asks for a personal decree for the amount Maury has paid the company, on the ground that it has forfeited its contract by refusing to give him a paid-up policy in exchange for his original policy. It makes the company and the trustee alone parties defendant, although leave is asked to make all the directors and stockholders parties hereafter when their names shall be ascertained.

The Blakey bill, a copy of which is filed in this court, though the original is not yet filed in the chancery court of Richmond, asks the assistance of the court to carry into effect the provisions of the trust deed. On the other hand, the suit in this court asks, in the name of the complainants and of all creditors who may come in, for the special and general relief usually asked in creditors' bills, that the trust deed shall be set aside, that the funds be collected and distributed, and that a receiver be appointed; and it makes the company, the trustee, and the stockholders all parties defendant. I overruled the objections raised by the two pleas on the following grounds, viz.: that non-resident citizens had a constitutional

right to sue this company in this court; that this company had policies distributed in many states of the Union, whose holders could not hear of its bankruptcy for a considerable time after its avowal here; and that the individual action of one of its officers, and of one of its creditors, who happened to be resident on the spot, in taking the mere incipient steps of a suit in a state court within a few days after the avowal of the company's bankruptcy, and before it could be known at a distance, more especially in the absence of any action of the state court assuming jurisdiction of the controversy or of the *res*, could not defeat the constitutional right of non-residents to sue in this court. And, in consideration of the fact that the defendant company's transactions embraced many states, making a United States court the more appropriate tribunal for the adjudication of its affairs, I decided that this suit must go on here.

The pleas to the jurisdiction being thus disposed of, I am now to pass upon the application of complainants for the immediate appointment of a receiver. The defendant company is confessedly insolvent. Being a life insurance company, insolvency and an assignment of all its effects in liquidation is final and irretrievable death to its corporate existence. It is incapable of taking care of its own effects, and has itself confessed the fact by assigning them to a trustee. That trustee has confessed his inability to administer the property in accordance with the deed, by taking steps to obtain the aid of a court of chancery in the task. By the insolvency, by the act of the defendant company in making an assignment in liquidation, and by the act of the trustee in invoking the aid of a court, the defendants in the suit here have themselves exhibited all the conditions requisite to authorize a court to appoint a receiver. It is useless to contend that courts should observe extreme caution in entering upon the appointment of receivers. Such caution is only necessary where the defendant company's insolvency is denied, where the company is in the full exercise of its franchises and use of its property, and where the act of the court would abruptly and harshly arrest it in its career of action, and wrest

its property from its use and control. It is true that in such a case a court should consider well the consequences of its action, and adopt the extreme recourse only when the facts of the case most clearly justify the measure.

But this defendant company is already extinct; its franchises are already forfeited and abandoned; its property already put by its own act out of its own use and possession, and committed to liquidation. Having thus itself made a case for a receiver, and actually anticipated a court in appointing one, this court is relieved from the painful inquiries and delicate responsibility usually devolved upon courts in passing upon applications for receivers; and, therefore, I am confronted with but a single question, which is whether or not this court will allow the defendant company to appoint its receiver for it.

This is an insolvent life insurance company—a company which has approached thousands of men and women in the land and said, if out of your annual earnings and savings you will pay me annual premiums of money during your natural lives, I will at your death pay to your widows and children certain thousands of dollars for their support. Having received these premiums for 12 or 15 years down to a few weeks past, it now reveals to the world that it cannot comply with the solemn obligations which it had undertaken. I think that the mere fact of the failure of a life insurance company is *prima facie* proof that its operations have been conducted in a fraudulent manner; and, if the failure is not explained by some great casualty, such as a wide-spread pestilence, or sudden financial convulsion, or physical calamity, I think that it is *per se* proof of fraud. I will not pretend to say that it creates the presumption of moral turpitude in the managers of the company, but it certainly does of constructive fraud; that is to say, of that financial imbecility or recklessness or extravagance, or that gross negligence, which is equivalent in its consequences to fraud, and which a court is bound to regard as constructive fraud.

Would the court be justified in allowing a trustee appointed by such a company, in the very deed in which it avowed its

insolvency, to remain in the custody of its effects and to administer them? Could the court expect to attract and retain the confidence of the public and of its suitors, if it should sanction such an act? I think not. The insolvency and abnegation of the company left its effects in the legal and rightful custody of no one, and the court must at once provide for the emergency by appointing a receiver.

It has not been the policy or practice of this court, in appointing receivers for insolvent companies, to appoint any one who had been officially and responsibly connected with the mismanagement which brought his company's affairs to ruin; and, for that reason, I cannot appoint Mr. Blakey as receiver here, in whose personal integrity I would otherwise have the utmost confidence, and whose high character I most cheerfully acknowledge.

The judge then announced the appointment of A. L. Boulware, Esq., as receiver of the company.

HICKS and Wife v. JENNINGS.

(Circuit Court, N. D. Georgia. October, 1880.)

- 1 MORTGAGE—FORECLOSURE—FRAUD.—Several tracts of land were sold under one contract, and separate deeds naming a distinct consideration were given for each tract. *Held*, that fraud and want of consideration in the sale of one tract could be set up as a defence in a suit to foreclose a purchase-money mortgage upon another of such tracts.
2. SAME—SAME—SAME.—*Held, further*, that such defence could be set up against the heirs and distributees of the mortgagor, where such mortgage had been transferred to them as an advancement.

In Equity.

The purpose of this suit is to foreclose a mortgage executed by the defendant to one Henry Irby, now deceased, dated May 7, 1877, on certain lots of land in Hall county, Georgia, known as the "Glade Mines," and containing 2,000 acres, to secure a note dated the said May 7, 1877, made by

said Jennings, and payable to said Irby, for \$10,000, and falling due January 1, 1879. The note recited on its face that it was given for part of the purchase price of the Glade mines, in Hall county, Georgia. Upon this note the defendant paid, on December 31, 1878, the sum of \$5,000 principal, and all the interest due up to that date; and, by an indorsement made on the mortgage by the payee of said note, the time for the payment of the note was extended to January 1, 1880. The bill alleged that in January, 1879, Henry Irby, the payee of said note, assigned said note and mortgage to the complainant Royal B. Hicks, and delivered the same to the complainant Sarah Jane Hicks, who was his daughter, as an advancement to her out of his estate, and the same was then and there accepted by her as such; that on February 20, 1879, said Henry Irby departed this life, and afterwards, on April 7, 1879, John F. Irby, who was a son, and C. L. Walker, who was a son-in-law, of said Henry Irby, for the purpose of carrying out the wishes of said Henry Irby in reference to said note, signed a transfer of all their interest in the same to complainant Royal B. Hicks, and authorized him to receive the money due on the same. The consideration of this transfer by John F. Irby and Walker was an agreement on the part of Sarah Jane Hicks to accept said note as an advancement, and account for the same in the final settlement of Henry Irby's estate; and the complainants, Hicks and wife, agreed to pay over to John F. Irby, and to C. L. Walker, for his wife, Agnes Walker, \$10,000 belonging to the estate of Henry Irby, then on deposit in a bank in the city of Atlanta. Of this sum \$5,000 was actually paid on July 18, 1879.

The defence relied on is stated substantially as follows: On April 27, 1877, the defendant entered into a contract in writing with the said Henry Irby for the purchase of certain mining lands in Georgia, then owned by said Irby. There were two tracts in Hall county, known respectively as the Glade mines and Chapman mines, each containing 1,000 acres, and lying contiguous to each other, and all designated as the Glade mines in said contract; and lot No. 133 of the

seventeenth district in Fulton county, Georgia. For these lands the defendant Jennings agreed to pay the sum of \$30,000, as follows: \$10,000 on the delivery of deeds; \$5,000 on July 1, 1877; \$5,000 on January 1, 1878; and the remaining \$10,000 at any time during the year 1878; and for that part of the purchase money which was unpaid, a mortgage was to be given on the Glade mines. When deeds were made by Henry Irby to Jennings for those lands, in pursuance of this contract, the parties required that the purchase money should be divided into three parts—\$10,000 for the Glade mines; and the like sum, each, for the Chapman mines, and for lot No. 133 in Fulton county. Three separate deeds were made—two for the Hall county lands, and one for lot 133 in Fulton county. Ten thousand dollars was paid by Jennings to Irby on the delivery of the deeds, and a mortgage given on the Hall county lands to secure the residue of the purchase money, which was evidenced by two notes for \$5,000 each, and one note for \$10,000. The two \$5,000 notes were paid at or before maturity, and a payment was made on the \$10,000 note of \$5,000, and all interest up to January 1, 1879.

The defendant alleges that in the treaty for the purchase of these lands Henry Irby represented that the said lot 133, in Fulton county, contained a valuable silver mine, and was worth \$15,000 or \$20,000, and that upon the strength of these assurances he agreed to give, without any examination of the Fulton county lands, \$30,000 for the three tracts of land, estimating lot 133 as worth at least \$10,000, and believing it to be worth \$15,000; and that he would not have purchased said lot 133, in Fulton county, or the said Hall county lands, but for the statements of said Henry Irby in reference to the value of said lot 133. He declares that he relied implicitly on the representations of Irby in relation to said lot 133, and had no opportunity to examine the same. Said lot was about 70 miles distant from the place where the contract of purchase was made.

The defendant says that all the statements of said Irby in reference to the value of said lot 133 were false, and Irby knew them to be false when he made them; that, so far

from its being true that said lot contained a valuable silver mine, there was not a trace of silver or other precious metal to be found upon said land, and, so far from its being worth \$15,000 or \$20,000, it was not worth more than three dollars an acre,—in the aggregate about \$600; and he claims that thence, by reason of said fraud, there should be no decree for complainants on said note and mortgage.

D. F. Hammond and W. R. Hammond, for complainants.

J. B. Estes, Claude Estes, and L. J. Gartrell, for defendant.

WOODS, C. J. The evidence leaves no doubt that Henry Irby, in his treaty with Jennings for a sale of the lands, mentioned in the answer of defendant, fraudulently misrepresented the value of lot 133 in Fulton county. The fact that a careful examination of the lot, and an assay of ores found upon it, shows that not a trace of any precious metal exists upon it, stamps the statements made by Irby to Jennings, in reference to its value, with falsehood and fraud. So far from being worth \$15,000 or \$20,000, on account of the deposits of silver to be found on it, as asserted by Irby, it is not worth over \$500 or \$600. Irby must have known that his representation was false, for he told Jennings that he had procured an assay of the ore taken by himself from the lot to be made, and that it proved to be rich in silver. The evidence shows that the lot 133 formed at least a third of the entire consideration given for all the lands sold by Irby to Jennings. If this suit were prosecuted by Irby, and if it were based on a note given for the purchase price of lot 133, there could be no question that the defence set up in the answer and established by the proof, showing the wilful fraud and misrepresentation of Irby, ought to prevail. But the suit is for foreclosure of a mortgage, executed to secure a note, given, as expressed on its face, for the purchase money of the Glade mines, and it is prosecuted, not by Irby, but by one of his heirs, to whom he transferred the note in his life-time, and who, at the time of the transfer and since his death, has agreed to consider it as an advancement on his share of his father's estate.

This state of facts raises two questions:

(1) Can the fraud of Irby, and the failure of the consideration in the sale of lot 133, be set up as a defence to a suit to foreclose the mortgage on another tract of land executed to secure a note given for the purchase price of that other tract? The evidence makes it clear that the purchase of the three tracts of land was one transaction. It was provided for in one instrument, and one gross sum named for all the lands which Irby agreed to convey. It is true that, in arriving at this gross sum, estimates were put on each tract, and that, when the written contract came to be executed, three separate deeds were made for the three tracts respectively, and a consideration of \$10,000 named in each. The deeds were all made, the cash instalment paid, and the mortgage executed at the same time. Now, if Irby himself were seeking to foreclose this mortgage, it is quite apparent that his fraud in selling lot 133 for \$10,000, which had been paid, might be set up as a defence against his recovery of the same amount as the consideration for another of the tracts sold by the same contract. In an action at law the defence might be restricted to the note sued on; but not so in a court of equity, which always looks at the substance of things, and seeks to do complete justice between the parties.

A court of equity would not allow a decree upon the note and mortgage in suit, and then turn the defendant over to another suit to recover the amount out of which he had been wronged by the fraud and falsehood of the complainant. Having the parties before it, it would adjust the controversies between them, springing out of the same transaction, according to equity and good conscience; and this would be to refuse a decree on this note and mortgage in consideration of the fact that the complainant had already defrauded the defendant, in the same contract out of which the note and mortgage sprung, to an equal or greater amount. Upon the facts of the case, therefore, if Henry Irby were the complainant, no decree should be made in his favor.

(2) The next question is, can the defence which the defendant could have set up against the note and mortgage, if the

suit to foreclose were prosecuted by Irby, be set up against his heirs and distributees? The transfer of the note by Henry Irby in his life-time to Sarah Jane Hicks, his daughter, was not for value; it was a mere gift. The rule is that a negotiable instrument, in order to be operative in the hands of an indorsee as against equities and defences existing between the maker and payee, must have been taken by the indorsee for value; that is, he must have parted with something valuable therefor at the time of the transfer. *Park Bank v. Watson*, 42 N. Y. 490.

Neither Sarah Jane Hicks nor her husband, Royal B. Hicks, paid anything for the note at the time of its transfer by Henry Irby. They parted with nothing of value as a consideration for the transfer. The same defences against the note were therefore open to the maker as if it had remained in the hands of the original payee. The agreement made between Hicks and wife, and the other heirs and distributees of Irby's estate, after Irby's death, did not change the terms on which Hicks and wife had received the transfer of the note and mortgage. They agreed to consider them as an advancement, and they had received them from Henry Irby as an advancement. The contract between them and the other heirs and distributees provided that in case of any recovery against the estate of Henry Irby, reducing the distributive shares of the heirs, they, the said heirs, would "refund their *pro rata* shares of such recovery to an extent sufficient to save indemnified and harmless the legatees of said estate, and make all parties interested therein equal." A fair construction of this contract would require, in case of a failure to collect the note in suit by reason of the defences set up, the answer that the residue of the estate should be equally divided between all the distributees, so as to give each an equal share. In any view that may be taken, the complainants neither paid nor surrendered anything of value for the transfer of the note and mortgage. The same defences are therefore open to the maker of the note as if the suit were prosecuted by Henry Irby in person.

The defendant Jennings, after setting forth in his answer

his defence to the case made by the bill, attempts, by calling his answer an answer in the nature of a cross-bill, to make the complainant Hicks, in his capacity of administrator of the estate of Henry Irby, a party to the original bill, and asks a decree against him, as such administrator, for the \$5,000 paid upon the note and mortgage on which the suit is based, with interest. An answer in the nature of a cross-bill is authorized by the Code of Georgia, but no such pleading is recognized by the equity practice of the United States courts. If the defendant had filed a formal cross-bill he could only make either the complainants or other defendants, if any, or both, parties defendant to his cross-bill. He cannot introduce a new party and ask relief against him. By asking relief against Hicks, as administrator of Irby, the defendant seeks to bring into the litigation a new party, and to obtain a decree against him alone. This is not permissible. The other parties to the case are not to be involved by the filing of a cross-bill in a controversy between one of the defendants and a stranger to the original litigation, in which they have no interest and to which they are not necessary or proper parties.

There can, therefore, be no decree in favor of the defendant against Henry Irby's administrator, as prayed for in the answer. There will be a decree dismissing the bill of complainants at their costs, and dismissing the claim of the defendant set up in his answer in the nature of a cross-bill, without prejudice to a suit upon the same by defendant against Henry Irby's administrator.

WARD v. PADUCAH & MEMPHIS R. Co.

(Circuit Court, W. D. Tennessee. ———, 1880.)

1. **PRACTICE IN EQUITY—REFERENCE.**—A case should not be referred to a master until the issues made by the pleadings have been settled by a decree. It is not proper to try those issues upon exceptions to the master's report.
2. **TORTS—DAMAGE TO CROPS BY ANIMALS OF THE OWNER—WHEN ADJOINING PROPRIETOR LIABLE.**—If crops be damaged by the animals of the owner, an adjoining proprietor can only be liable when, by some prescription, contract, or statutory duty, such liability is imposed on him.
3. **RAILROADS—FENCE LAW—CATTLE-GUARDS.**—The ordinary fence laws of Tennessee do not apply to railroad companies, and there is neither a common-law nor statutory obligation on them to construct or maintain cattle-guards for the protection of crops growing on the cultivated lands through which their roads pass. Neither was the act of 1875, c. 64, intended to apply to railroad companies, although the land on which the track is built is within "one general enclosure," made by joining the fences of the farmer to the cattle-guards of the railroad. These laws were intended for adjoining land owners engaged in agriculture, who are mutually benefited as well as bound by them.
4. **SAME—IMPLIED CONTRACT.**—In the absence of a contract, or charter obligation, or some statutory duty to maintain cattle-guards, none will be implied from the fact that the company has constructed them along the line of road where it enters and leaves cultivated fields, unless the lapse of time has raised the presumption of a grant or covenant.
5. **CONTRIBUTORY NEGLIGENCE—STRAYING ANIMALS—DUTY OF THE OWNER OF THE CROP.**—The owner of crops, having knowledge that straying animals may pass over defective cattle-guards and destroy the crops, cannot recover for their destruction without using every means an ordinarily prudent person would use to protect them. It is contributory negligence not to do this.

In Equity.

Finlay & Peters, for petitioner.

Gantt & Patterson, for defendants.

HAMMOND, D. J. The practice adopted in this case, of referring the petition to a master before any decree settling the rights of the parties upon the issues made by the pleadings, has resulted in trying intricate questions of law and fact

upon exceptions to the master's report, which does nothing more than ascertain the *quantum* of damages alleged to have been sustained. It is a practice that has been justly condemned as intolerable, is certainly inconvenient and perplexing to the court, and should not be resorted to in the future. *Cobb v. Jameson*, 1 Tenn. Ch. 604; *Eubank v. Wright*, 2 Tenn. Ch. 538; *Patten v. Cone*, 2 Leg. Rep. (Nashville,) 173.

Technically, the decree of reference is an adjudication against the receivers that damages have been sustained for which they are liable, and, strictly taken, the only question would be as to the amount; but such has not been the understanding of the parties, and I have considered the questions as if the case were before me upon the pleadings and the proof.

The petition is filed to recover damages to the petitioner's crops by straying animals, through the alleged negligence of the receivers of this court, while operating the railroad. The claim is for about \$1,581, and the master has allowed \$973.27, the receivers insisting that at most the proof shows only \$372.50. Exceptions to this report are filed by both sides, and they raise the questions to be determined. The negligence complained of was a failure to keep the cattle-guards on the line of petitioner's field, through which the road passes, in a condition to exclude the animals. The defences are these: (1) That the railroad company was under no obligation to fence or guard the crops of petitioner; (2) that the cattle-guards were not negligently kept; (3) that the damage occurred by the negligence of the petitioner herself.

The proof on some points is very conflicting, but I think the following statement contains the facts proved, and are those upon which the rights of the parties must be determined:

The petitioner, being the owner of a field of about 500 acres of enclosed and cultivated land, granted the railroad the right of way of the necessary width, not exceeding 100 feet on each side from the center of the road, and agreed in writing to make a deed to the right of way whenever the

road was permanently located. This memorandum of the grant contains no covenant or reservation binding the company to keep and maintain a fence between the lands so granted to the company and the adjoining lands of the petitioner. It is conceded that the charter of the company imposes no such obligation, and whether the general or statute laws of the state do or not will be hereafter considered.

The company, in constructing its road, did build cattle-guards at the points of entrance and exit into this and all other fields through which it passes, and the fences of petitioner being joined to the cattle-guards, the enclosure of the railroad land and the two now separated parcels of the petitioner was complete. Near one of these cattle-guards was a highway along the fence and across the railroad, and on either side of the field unenclosed lands. These cattle-guards were allowed to fill up, so that straying animals could cross them, and by this means cattle entered the field and committed the damage complained of here. The cattle and hogs doing the damage mostly belonged to the petitioner, as she says herself in her deposition, and there is nothing in the proof to show what proportion of the damage was committed by other animals than her own. The damage was mostly done by hogs.

The proof is conflicting on the question of negligence, but I think establishes that these guards were not properly attended to, and were allowed to fill up, and the animals entered the fields over them. The proof shows that the damage was not committed at one time, but the animals habitually trespassed on the crops for two years. Newton Ward, a son of petitioner, says he drove the animals out of the field frequently,—five or six times, he thinks,—until he saw it was useless, and let them alone. He says the trespass began in June, and continued until the crops were nearly ruined. He handed a note to one of the witnesses to be given to the superintendent, informing him of the condition of the cattle-guards, which that witness says was delivered.

Another witness for petitioner says he informed the railroad hands about the trespasses, and others say the train-

hands could see the hogs in the field from the cars. The railroad hands say they knew nothing of the trespasses, except at the time the note was sent, when the guards were cleaned out. It does not appear when this note was sent, whether at the beginning of the trespasses or later on, but the petitioner's witness, who carried the note, says Givens, the superintendent, said that if Mrs. Ward would send some hands and have the cattle-guards cleaned out it would stop the damage. Mrs. Ward says she "did not think it her business to repair the cattle-guards." The proof shows that six or eight hands could clean them out in a day; some of the witnesses say half a day, others longer. The description of the guards shows that it was no very difficult or costly operation to clear them of the filling and keep them clear. On the whole, this proof establishes that Mrs. Ward neither kept her animals up, kept them out of the fields by other means, or cleared out the cattle-guards; but, relying on the theory that the company was liable for the damages, she permitted her own animals to destroy her crops, supposing she had performed her whole duty in the matter when she gave the company's agent notice of the condition of the cattle-guard. It is proper to say that while the petitioner claims for damages to the crops of two years, the proof is mostly confined to the crop of one year.

The anomaly of this case is that the petitioner is seeking to recover, from an adjoining land owner, damages done to her crops *by her own animals*. The owner or keeper of animals is generally liable for damages done by them when they are trespassers. *Fletcher v. Rylands*, L. R. 1 Exch. 263, in which the opinion by *Blackburn, J.*, traces the earliest cases for the doctrine as far back as 20 Edw. IV. It is there said that "if the owner of 200 acres in a common moor enfeoffs B. of 50 acres, B. ought to enclose, at his peril, to prevent damage *by his cattle* to the other 150 acres; for, if his cattle escape thither, they may be distrained damage feasant. So the owner of the 150 acres ought to prevent his cattle from doing damage to the 50 acres at his peril," (citing *Comyn's Dig. tit, "Droit M."* 2, and *Dyer*, 372*b*;) 1 *Thomp. Neg.* 27; v.4,no.10—55

and, "if A. and B. have lands adjoining, where there is no enclosure, the one shall have trespass against the other on the escape of their beasts respectively." Id. 28.

This would seem to preclude the idea of one having a cause of action against another for trespasses by one's own cattle on one's own land or crops, unless there be some extraordinary liability, growing out of other obligations than those imposed upon adjoining land owners towards each other. Mr. Addison says that the making of a fence by a land owner does not raise any inference that the fence was intended for the benefit of his neighbor, although the fence prevents his neighbor's beasts from trespassing as well as his own, for it is for his own benefit to prevent his beasts from trespassing on his neighbor. 1 Add. Torts, (4th Ed.) 149. And, where statutes or self-interest require him to protect his land with fences from straying cattle, still less can there be any inference from the mere building of the fence that there is an implied contract to maintain it for the benefit of his neighbor who happens to be protected by it. There may be, unquestionably, a valid prescription binding the owner of land to maintain perpetually the fence between him and the adjoining proprietor, but, in the absence of some covenant or grant, this servitude can only be established, like other prescriptions, by long-continued, peaceable, and uninterrupted enjoyment for the length of time necessary to raise the presumption of a grant or covenant. Id. and notes; Id. 96, and notes.

The petitioner here might, in consideration of her grant of the right of way, have imposed this obligation on the company, or she might have demanded as a consideration money enough to cover the costs of the necessary fences in the changed condition of her fields; but, not having used this precaution, she cannot supply the want of it by any implication of a contract imposing the obligation.

An American railway company is not bound to fence its railway, as an American farmer is bound to fence his fields, and in the absence of statutes imposing the obligation it does not exist. *Railroad v. Skinner*, 19 Pa. St. 298, 303; *Clark v.*

Railroad, 36 Mo. 202; *Dean v. Railroad*, 22 N. H. 316; *Williams v. Railroad*, 2 Mich. 259; 1 Add. Torts, 214, and notes; Cooley, Torts 654; 1 Redf. Ry. 483 *et seq.*; Id. 499 *et seq.*; Sherm & Redf. Neg. 508 *et seq.*; 1 Thomp. Neg. 503, 514.

It was judicially determined, in one case, that for the purposes of a railroad the land on which it was built had better remain without fences, there being less danger of killing cattle that would be penned up, so to speak, by the fences, and consequently less danger to trains and travelers. *Railroad v. McConochie*, 3 Edw. Ch. 487. And, for want of mutuality of benefits, it was, therefore, ruled that the equitable doctrine of contribution for partition fences did not apply as between a farmer and a railroad owning adjoining lands. Id. And, in our own state, it has been held that our fence laws do not apply to towns, but to agricultural localities, and this upon reasoning which will exclude their application to railroads which have no beasts to trespass on others, and no crops to protect. *Lightfoot v. Grove*, 5 Heisk. 473; *Staub v. Fantz*, 11 Heisk. 766. It may be very well doubted, therefore, whether, in the absence of express language applying the fence laws to railroads, they are to be held bound by them. Indeed, it may be doubted whether the legislature could by law impose the servitude upon them of keeping up fences for the benefit of adjoining land owners. In consideration of a charter it might be done, or possibly by the exercise of the police power of protecting life and property while using the roads, the protection to crops being merely incidental. *Thorpe v. Railroad*, 27 Vt. 140; *Trice v. Railroad*, 49 Mo. 438.

I think, therefore, in view of these decisions, that, inasmuch as our fence laws do not in express language apply to railroads, nor indicate any purpose of adopting, as a police regulation, a requirement that railroads shall be fenced, they do not impose on railroads in this state any obligation to keep and maintain fences, either as partition fences or otherwise. This company was, therefore, in the absence of any charter obligation, or of any contract express or implied, or of any prescription binding it, not bound to construct or maintain

cattle-guards for the protection of Mrs. Ward's crops. There are courts, however, that hold that fence laws impose the same obligation on railroads as other adjoining proprietors; and perhaps, where the company owns the land, and does not possess, as in this case, a mere right of way over land belonging to the original proprietor, there may be sound reason in saying that they are liable to the same laws that govern adjoining proprietors of land, and that the uses to which it is put cannot alter the case, though the Tennessee cases before cited, as to partition fences in towns, seem to indicate a different view. 1 Redf. Ry. 486, 499. I have considered this case in that aspect, and, if these statutes do bind the company, it should be determined what are the rights of the parties on the facts of this case.

We have seen that at common law there is no obligation on adjoining proprietors to fence their lands, and certainly none to fence for each others' benefit. Neither the Code, nor the subsequent acts amending it, are compulsory in any other sense than that a farmer, who fails to build a legal fence, is deprived of any right of action against the owners of straying cattle trespassing on his lands. T. & S. Code, 1682-1693, Acts 1877, c. 35. Adjoining proprietors are at liberty, if they see fit, to dispense with fences altogether. *Aylesworth v. Herrington*, 17 Mich. 417, 424; *Tecksbury v. Bucklen*, 7 N. H. 518. If all that is claimed for the operation of the fence laws be admitted, it only amounts to this: that the petitioner here would be exempt from liability to the railroad for any trespass her animals should commit in straying on its lands, because the company has not fenced them, as the law requires. If the petitioner had made partition fences, under the circumstances mentioned in the statutes, the adjoining land owner might be compelled to pay his part of the cost and repairs. T. & S. Code, 1687.

But there is nothing in the Code to compel an adjoining owner to make either partition or other fences for the benefit of his neighbor. The company was not, therefore, bound to construct a fence or cattle-guard, or to maintain it. If one construct a fence upon his own land, he may remove it at

will. If, however, his neighbor has, with his consent, joined his fence to it, and its removal would expose the neighbor's crops, he should give notice and allow time for protection before removal; but this imposes no obligation to keep up the fence, or any liability for failure to do so. Neither the Code, nor the act of 1877, c. 35, makes an adjoining land owner responsible in damages for a failure to keep up his share of the partition fence, nor makes any apportionment of the fence for each to keep up, from which this liability for failure to repair could be implied. The other owner may erect and repair and collect the cost. Under a similar statute in Alabama, from which ours is largely copied, it was held he had a right of entry to make repairs. *Henry v. Jones*, 28 Ala. 385. Hence, there is no other liability, under these statutes, than for a share of the costs of repairs. The statutes in some of the states proceed upon the other plan, and assign certain portions of the fence to each owner, and he becomes liable in damages for failure to repair, but our Code does not.

We come now to the act of 1875, c. 64, p. 75, the first section of which enacts, among other things, that "if either of the parties, having a joint or partition fence, refuse or neglect to keep up his part of said fence in good repair, he shall be liable for all damages the other may sustain to his enclosures or crops by trespassing stock in consequence of such refusal or neglect." The second section enacts that "where there is no partition fence between the owners of any lands in this state, and said lands being in one general enclosure, then each party shall be liable to the other for any trespass or damages upon or to his land or crop thereon caused by the neglect or failure of said other party to protect the said enclosure or crop on his or their side of said general enclosure."

This case does not fall within the first section at all, because this is not a *partition* fence, (the cattle-guard,) which is defined by statute to mean "fences on the line between lands owned by different persons." T. & S. Code, 1691. No provision is made for designating by assignment of fence viewers or otherwise, as is usual in statutes proceeding on this principle of compensation in damages, (for the first time in this state

adopted by this act,) the particular portion of the fence each owner is to be responsible for, and I do not see how either is to be held for any particular portion without such provision. However, it is clear the first section cannot apply to this case. The case does undoubtedly fall within the letter of the second section, because the cattle-guards and the adjoining fencing on the company's land, when joined to Mrs. Ward's fences, place the railroad land and her fields within "one general enclosure."

As before remarked, it is my judgment that this statute never was intended to apply to land on which a railroad is built, surrounded by and enclosed with fields like this, and for the manifest reason of a want of mutuality of benefit. The company derives no benefit from this enclosure. It may keep cattle outside of this particular part of the track, but the road is open to all cattle within the enclosure, and Mrs. Ward has an undoubted right to keep such cattle there as she chooses. There is no benefit to the railroad, nor protection against cattle trespassing on its land, nor any need of it, in the absence of a fence along the whole road. If Mrs. Ward's cattle, being in her field, or other cattle being there by her permission, or through her neglect to keep up her part of the fences around the enclosure, were to go upon the railroad and cause the wreck of its trains, there could be no recovery against her by the company. The statute was clearly only intended to apply to farmers mutually benefited by having lands within a common enclosure, which they cultivate or otherwise use for agricultural purposes. It is the merest literalism to apply the statute to a case like this.

But, again, if it be conceded that this statute does apply to a case like this, the petitioner cannot recover, because of her contributory negligence. It may be admitted in this connection that the common-law obligation on every person to restrain his beasts on his own land has been so far modified that no negligence can be imputed if they are suffered to run at large. *Kerwacker v. Railroad*, 3 Ohio St. 172; *Railroad v. Waterson*, 4 Ohio St. 424; *Seeley v. Peters*, 10 Ill. 130; *McAfee v. Crawford*, 13 How. 447, 457; *Alger v. Railroad*,

10 Iowa, 268; Cooley on Torts, 337. This doctrine is recognized in the case of the *Railroad v. Smith*, 9 Heisk. 860, 865, as the effect of our fence laws. These cases were those of injury to animals straying on the railroad, and the better rule seems to be that in this country it is not such contributory negligence to allow animals to run at large as will exempt the railroad company from liability for injuring them. But it is carrying this doctrine much further than these cases justify, to hold that this privilege of permitting animals to run at large is a right which the law will protect to the extent of allowing damages committed by them on the owner's own crops, lest to refuse the damages would be to deprive her of the privilege of permitting them to run at large. The privilege is only permissive, and the only effect is that the owner of animals is not liable as a trespasser if the lands on which they stray are not lawfully fenced. It gives no right of common or depasture in the land. The animals are trespassers, but the owner of the land cannot recover of the owner of the animals for the trespass, except under certain conditions which the statute law has imposed. *Knight v. Abert*, 6 Pa. St. 472; *Railroad v. Rollins*, 5 Kan. 167; *Calkins v. Matthews*, Id. 191; *Herold v. Myers*, 20 Iowa, 378; *Williams v. Railroad*, *supra*; *Railroad v. Skinner*, *supra*.

But, be this as it may, it was the grossest negligence in the petitioner to turn her animals out when she knew that they could and would pass the cattle-guards and destroy her crops. If she had had a contract with the company to maintain the cattle-guards it would have been her plain duty to lessen the damages by keeping up the hogs and suing for their keep, or whatever other damage that would cause her. Moreover, she might have cleaned out the cattle-guards and charged the expense of the process to the company. It is no answer to this to say that she would have been a trespasser. She probably would not have been, but until she made an effort in that direction, and was warned off, it was folly to stand idly by and see her crops destroyed, with no effort made to save them. That course was suggested to her by some of the employes of the company, and she says herself

"that she did not think it her business to clean out the cattle-guards." In this she was mistaken. She might, at small expense compared to the heavy damages she claims, have employed boys or men to watch these gaps day and night, and thereby have saved her crops. In some way it was her duty to have protected them, and her failure was contributory negligence, under any rule which may be adopted on that subject. Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done. The question in such cases is—*First*, whether the damage was occasioned entirely by the negligence or improper conduct of the defendants; or, *second*, whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. *Railroad v. Jones*, 95 U. S. 439, 442; *Trow v. Railroad*, 24 Vt. 487; *Stuck v. Railroad*, 9 Wis. 202; 21 Albany Law Jour. 404.

The mistake of petitioner is that she seeks to impose too exclusively on the defendant company the duty of protecting this crop, and to relieve herself too entirely from all responsibility in the matter. If one negligently leave a gate open, and the owner sees it, and passes it frequently and wilfully and obstinately, or, through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. *Locker v. Damon*, 17 Pick. 284, 288. And, if the party injured has it in his power to take measures by which his loss may be less aggravated, this will be expected of him. The law will not permit him to throw a loss upon another arising from causes for which the latter may be responsible, if by common prudence the damage could be prevented. *Miller v. Mariners' Church*, 7 Me. 51, 56; *Simpson v. Keokuk*, 34 Iowa, 568; *Little v. McGuire*, 38 Iowa, 560. Where trespass was committed by wrongfully removing part of a fence, damage to crops was refused because the plaintiff had neglected to build fences for their protection. *Smith v. Johnson*, 76 Pa. St. 191. In an action for a breach of a specific contract the party injured is

bound to use proper means and efforts to protect himself from unnecessary loss or damage, and can charge the party only for such damages as by reasonable endeavors and expense he could not prevent. *Walker v. Ellis*, 1 Sneed, 514. Where there was a stipulation to keep a dam in repair, the cost of repairs is the only measure of damages, not damages for the mill lying idle. *Fort v. Orndoff*, 7 Heisk. 167. There is nothing in the principle adopted in *Dush v. Fitzhugh*, 2 Lea, 307, to change the rule above laid down on the subject of contributory negligence. The proximate cause of the injury to the petitioner's crops was her negligence in turning her hogs out when she knew they were destroying her crop, or failing to put them up after she saw them in the fields, or otherwise protecting her crops; and the negligence of the defendants was only remote. I do not overlook the fact that there were some other animals than her own with hers; but, as to these, she could have kept them out in many ways, and she should have done it.

Petition dismissed at costs of petitioner.

in re DEXTERVILLE MANUF'G & BOOM CO., SCRANTON MANUF'G & BOOM CO., and another, *v.* CASE, Receiver, etc.

(Circuit Court, E. D. Wisconsin. December 10, 1880.)

1. RECEIVER — CLAIM FOR DAMAGES AGAINST A RAILROAD COMPANY — COMPANY IN DEFAULT FOR INTEREST.—The net earnings of a railroad, while in the possession of a receiver appointed by the court, pending the foreclosure of certain mortgages upon the property, cannot be applied to the payment of claims for damages which accrued during the operation of the road by the company, although such company was then in default for the non-payment of interest upon the mortgage bonds

Demurrer.

Geo. H. Noyes and *G. C. Prentiss*, for petitioners.

E. C. & W. C. Larned, for receiver.

DYER, D. J. The petitioners above named have presented petitions for the allowance of claims to a large amount against the receiver of the Green Bay & Minnesota Railroad, who is operating the road under the direction of this court, pending the foreclosure of certain mortgages upon the property, which demands are for loss and damages claimed to have been sustained by the petitioners in the destruction of timber and cranberry marsh along the line of the road by fire, alleged to have been set by sparks escaping from defective locomotives. By suitable and separate allegations it is charged that the fires which caused the damage occurred on different days in different years, and it is thus made to appear in each of the petitions that one of these fires occurred on the seventh day of September, 1877, which was more than four months before a foreclosure of the mortgages in suit was commenced, and before a receiver was appointed. To such parts of the petitions as thus allege, as causes of action against the receiver, loss and damage by fire while the road was yet being operated by the railroad company, and before it passed into his hands, the receiver has demurred, and the demurrer raises the question whether such claims can be allowed or entertained against him or the property which he has in charge for the bondholders, or against any party other than the railroad company by whose negligence it is alleged the loss and damage were occasioned.

In *Hale v. Frost*, 99 U. S. 389, it was held that the net earnings of a railroad while it is in possession of a receiver, appointed by the court, may be applied to the payment of claims having superior equities to that of the bondholders. To sustain the claims in question, it is therefore necessary that some equity be found in favor of the petitioners and superior to that of the bondholders, upon which to base their allowance. And the supposed equity urged is that the fire in question occurred after default on the part of the railroad company in payment of the mortgage debt or interest; that thereafter the company operated the road as the agent or trustee in equity of the bondholders, and that the alleged lia-

bility sought to be enforced in the present proceeding arose from such operation of the road and as an incident thereto; that, therefore, it may be put under the head of operating expenses, and so acquire rank as a claim having equities enforceable against the net earnings of the road in the hands of the receiver. There is some plausibility in the argument, but it is unsound. No relation of principal and agent, either in law or equity, can be implied from the mere fact that the railroad company continued to operate the road after it was in default in payment of the mortgage debt, nor from the further fact that the bondholders did not take possession of the property after such default, nor from both facts combined. The mortgages gave to the mortgagees the right to take possession after default, but they were not obliged to do so, nor was it necessary that they should take possession in order to avoid such a liability as is here claimed. The railroad company was operating the road when the alleged loss and damage occurred. The negligence of the company, if there was negligence at all, occasioned the loss. For that negligence it alone was responsible. To sustain the position taken by the petitioners, it must be held that the bondholders at least impliedly assumed liability for the negligence of the railroad company, and that by operation of law their mortgage security was subordinated to claims of the character of these. I cannot so hold. The alleged causes of action accrued after the company had given mortgages upon all its property, which were then subsisting liens, and before the receiver was appointed. It can make no difference that they accrued after the company was in default in payment of interest on its bonds. The road was still being operated by the company, and whatever liability existed must have been one against the company alone. In no just or proper sense could such claims as these be considered as part of the operating expenses upon which the petitioners could assert a right prior to that of the mortgagees. They are wholly unlike claims for supplies, new equipment, right of way, and new construction, or any claim falling legitimately under the head of operating expenses, which the courts sometimes order paid from net earnings in

the hands of a receiver as having equities superior to those of bondholders. If such claims as are here in question could be allowed, there would seem hardly to be a limit to the allowance of demands which it might be as forcibly urged were superior in their equities to those of the secured creditors, but which could not be allowed upon any sound principle of equity, nor without substantially impairing and perhaps destroying an otherwise valuable security.

The demurrer to such parts of the petitions as state causes of action against the railroad company accruing prior to the appointment of the receiver, is sustained. And it is not improper to add that this ruling is supported by the practice of the learned circuit judge of this circuit, who has uniformly disallowed claims against a receiver of the character of these.

MERCHANTS' NAT. BANK *v.* THOMPSON.

(Circuit Court, D. Massachusetts. December 22, 1880.)

1. REMOVAL—ACT OF 1875, § 2.—Suit was brought by the Merchants' National Bank of Boston to foreclose the equity of redemption of the defendant, Edward Thompson, of Charlestown, New Hampshire, in five shares of trust property held by the plaintiff as collateral security for the payment of the defendant's bond. The defendant averred in his answer that he had sold one of the shares to Henry M. Clarke, of Boston. The plaintiff thereupon amended its bill, and made Clarke a party defendant, who subsequently entered an appearance. *Held*, that such cause could not be removed under the second clause of section 2 of the act of 1875.
2. SAME—JURISDICTION—PROOF.—*Held, further*, that it would be presumed that Clarke was a citizen of Massachusetts, in the absence of any proof to the contrary.

In Equity.

Russell Gray, for plaintiff.

Jabez Fox, for defendant Thompson.

LOWELL, C. J. This is a motion to dismiss or remand. The Merchants' National Bank of Boston brought a bill in equity in the supreme judicial court of Massachusetts to foreclose

the equity of redemption of Edward Thompson, of Charlestown, in the state of New Hampshire, in five shares of the trust property known as the Huntington-avenue lands, held by the plaintiff as collateral security for the payment of said Thompson's bond for \$20,000 and interest, which had come to the plaintiff by assignment from the original holders thereof, and on which all but \$1,000 of the principal, and large arrears of interest, were overdue and unpaid. The defendant Thompson appeared and answered, admitting most of the allegations of the bill, but averring that, under the peculiar terms of the trust deed of the lands, a pledgee or mortgagee of shares had no right of foreclosure; and, further, that he had sold one of the five shares to Henry M. Clarke, of Boston. Thereupon, June 15, 1880, the plaintiff amended its bill and made Clarke a party defendant, and on the same day a subpoena was issued to said Clarke to appear on the first Monday of July, 1880. September 13, 1880, Thompson filed in the state court a petition to remove the cause to this court, averring that the bank is a corporation located in and doing business in the state of Massachusetts, and that the petitioner was, at the commencement of the suit, and still is, a citizen of New Hampshire. A bond was filed, to which no objection is taken.

The suit was entered in this court on the first day of this term, October 15, 1880, and I find copies of the bill, amended bill, answer, etc. I do not find any order of the supreme court concerning the removal, nor is one necessary, though it is usual. I do find a certificate of the clerk that an appearance was entered for Henry M. Clarke "during the April term, A. D. 1880," but whether before the petition for removal was filed, on the last day of that term, does not appear.

The defendant Clarke, having been brought in by amendment, is a party to the suit as much as if he had originally been named as a defendant.

The first objection taken to the removal is that the defendant Thompson has adapted his petition to the first clause of section 2 of the act of 1875, (18 St. 470,) as if he were the sole defendant, taking no notice of Clarke, while he now at-

tempts to support the jurisdiction of this court under the second clause, contending that there is a controversy wholly between himself and the plaintiff. I understand the law to be that if, upon the whole record, the jurisdiction of the court can be sustained, the cause will not be remanded for such a misconception in the petition. *Osgood v. Chicago, etc.*, R. Co. 6 Biss. 330; *Ruckman v. Ruckman*, 1 FED. REP. 587. I have once, with the approval of the circuit justice, allowed such a petition to be amended in the circuit court in New Hampshire. It was a case which had been tried after its removal, and a verdict obtained, which, being set aside, the plaintiff discovered that the petition was defective in its allegations of citizenship. I did not feel at liberty to order the plaintiff to amend his own writ, but I did permit defendant to amend his petition. This rule is reciprocal; for if the record shows, at any time, that the suit does not really and substantially involve a controversy properly within the jurisdiction, the court is required to remand it. St. 1875, § 5; 18 St. 472.

Is there a controversy in this suit wholly between the plaintiff and the defendant Thompson? I think not. The suit is to foreclose the equity of five shares in certain lands mortgaged by one person, at one time, for a single debt. When the plaintiff supposed that Thompson still owned all the shares, and brought suit against him, it was a controversy wholly between them. If the plaintiff had not chosen to bring in Clarke, or if Clarke had disclaimed or had made default, and a final decree had been made for or against him, the controversy might once more be between these parties only. But it is the right of the plaintiff to have a single foreclosure of his single debt and mortgage. He is not bound to undergo the expense of two suits, upon what is to him a single cause of action. Clarke, I suppose, has a similar right to insist that a single suit shall settle his position relatively to the defendant Thompson. Thompson has no right to say that the controversy concerns only his four shares, if either the plaintiff or Clarke wish the controversy as to the whole five to be disposed of.

I have looked at many of the cases, but none of them resemble this case very closely. It is for the good sense of the court in each case to discover whether there is one distinct and independent controversy between citizens of different states. If there is, the cause may be removed by any one of the party, no matter how many other controversies may be involved in the same suit, between persons who could not be impleaded in the circuit court.

It has been intimated, though not decided, that if defendants are jointly sued upon a joint and several contract, as trespassers for a joint trespass, that, inasmuch as each defendant is severally liable, any one having the requisite citizenship might remove the cause, at least when the form of action was such that no question of contribution between the defendants could be effected by it. I have not seen even an intimation that they could sever when the plaintiff's right was single, and the defendants had, of themselves, and for their own convenience, split up the subordinate titles.

I am of opinion, therefore, that there is not, at present, a controversy wholly between the plaintiff and the petitioner Thompson.

I have presumed, as both counsel did, that Clarke, who is described as of Boston, is a citizen of Massachusetts. This ought to appear affirmatively, if the jurisdiction of this court depended upon its affirmation; but, as the burden of proof is on the removing defendant, and it does not appear that Clarke is not a citizen of the place of his residence, no amendment is necessary in order to find that the jurisdiction is not made out.

Cause remanded.

HOMANS v. NEWTON and others.

(Circuit Court, D. Massachusetts. December 21, 1880.)

1. **LOGGING PERMIT—BONA FIDE PURCHASER.**—A contract between a citizen of New Jersey and a citizen of Maine, called a conditional license, authorizing the grantee to enter upon the lands of the grantor, in the state of New Hampshire, and cut logs therefrom, contained this clause: "Said grantor reserves and maintains full control and ownership of all logs and lumber which shall be cut under this permit, wherever and however situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and the sum or sums due, or to become due, for stumpage or otherwise, shall be fully paid." *Held*, that a *bona fide* purchaser of logs cut under this permit could not acquire a better title than the grantee.
2. **SAME—TROVER—DAMAGES.**—It was further provided that if any default should be made, the grantor should have full power and authority to take all or any part of said lumber, and to sell and dispose of the same at public or private sale, and, after deducting reasonable expenses, commissions, and all sums which were then due, or might become due, for any cause "herein expressed," should pay the balance to the grantees. *Held*, under this clause, that the grantor was not entitled to recover, in trover, of such *bona fide* purchaser, the whole value of the logs sold.
3. **SAME—PAYMENT—WAIVER.**—A memorandum upon the foot of an account settled between the grantor and grantee, acknowledging the receipt of certain accepted drafts, running from three to eight months, for the sum of the account, contained these words: "which, when paid, will be in full for the above." *Held*, that the acceptances were not taken in payment of the account, and therefore could have no effect as a waiver of the grantor's rights.

Trover.

Tort, in the nature of trover, for the conversion of certain logs, valued at about \$14,000. In November, 1875, the plaintiff, a citizen of New Jersey, owning a large tract of land on, or near, the Connecticut river, in New Hampshire, made a contract with Ross & Leavitt, of Bangor, Maine, called a conditional license, by which he granted them permission to enter upon his land and cut logs of certain kinds during the then next logging season, which were to be scaled—that is, measured—by a scaler appointed by the plaintiff, and the agreed stumpage was to be paid for by satisfactory paper, on

a certain credit, and the plaintiff was to make advances when the logs should arrive at the boom, in Hartford. The grantees agreed to conduct the cutting and driving of the logs in a certain way, and with a certain diligence, and to pay damages in case of any default. The contract contained this clause: "And said grantor reserves and maintains full control and ownership of all logs and lumber which shall be cut under this permit, wherever and however situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and the sum or sums due, or to become due, for stumpage or otherwise, shall be fully paid;" and, if any default should be made, he should have full power and authority to take all or any part of said lumber, and to sell and dispose of the same at public or private sale, and, after deducting reasonable expenses, commissions, and all sums which were then due, or might become due, for any cause "herein expressed," should pay the balance to the grantees.

Ross & Leavitt were interested as stockholders in a corporation called the Hartford Lumber Company, which owned a mill at Hartford, of which the boom is mentioned in the contract. They cut the timber as agreed, and floated it down the Connecticut river; the first lot arrived at Hartford in August, 1876. In September, 1876, an account was settled between Homans and Ross & Leavitt, showing a debt of \$11,248.52 for stumpage, and \$10,250 for advances. At the foot, Homans acknowledged the receipt of drafts for the sum of the account drawn by Ross & Leavitt upon, and accepted by, the Hartford Lumber Company, running from three to eight months, "which, when paid, will be in full for the above." These drafts were dishonored, and have not been paid.

The Hartford Lumber Company bought all the logs which reached Hartford, and manufactured and sold a part of them, worth about \$12,000, with the knowledge of the plaintiff, before the first acceptance was dishonored. November 22, 1876, the plaintiff took possession of the lumber remaining at the mill, and the company worked it up and sold it for
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him under a contract by which they were to have 30 per cent. of the proceeds for sawing, handling, and commissions. They afterwards became bankrupt, and the plaintiff sold one-half the lumber remaining on hand for \$4,000, and worked up the other half, for which he received \$5,750. They received some other payments from Ross & Leavitt.

The defendants, living in the western part of Massachusetts, bought of Ross & Leavitt certain lots of logs that were being driven down the river in September, October, and November, 1876, and which, of course, never arrived at Hartford. They bought in good faith, without notice of the plaintiff's title, and had made payment of the full price of about \$14,000, before he made a demand upon them, March 1, 1877. The plaintiff had no knowledge of the defendants' purchase until November 26, 1876. Between that day and the day of the demand, the defendants had built a mill for sawing the logs, at a cost of about \$3,000, and had paid to Ross & Leavitt \$621.20. Ross & Leavitt had made sales of other logs in like manner to persons not before the court.

The case was referred.

The referee found the foregoing facts, and submitted the points of law, with his rulings upon them, to the court. He found that the plaintiff retained the property in the logs; that he had not waived his rights; that he was entitled to recover in this action the balance due him from Ross & Leavitt, \$3,084.51, and interest at 7 per cent. from the date of the writ, but not the full value of the logs at the time of the conversion; that no deduction was to be made for the cost of the mill, because it appeared to be still worth its cost; nor for the payment of \$621.20, unless the whole value of the logs should be the measure of damages, in which case this payment, which was made after the plaintiff knew of the sale to the defendants, should be deducted.

Caleb Blodgett, for plaintiff, cited, (of cases not referred to in the opinion of the court:)

On question of property: *Hart v. Carpenter*, 24 Conn. 427; *Fisfeld v. Elmer*, 25 Mich. 48; *De Wolf v. Babbett*, 4 Mason, 289.

That no demand was necessary: *McCombie v. Davies*, 6 East, 540; *Bucklin v. Beals*, 38 Vt. 653; *Stanley v. Gaylord*, 1 Cush. 536.

There was no waiver or estoppel: *Sargent v. Metcalf*, 5 Gray, 306; *Plumer v. Lord*, 9 Allen, 455; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; *Zuchtman v. Roberts*, 109 Mass. 55; *Dezell v. Odell*, 3 Hill, 219; *Root v. Lord*, 23 Vt. 568.

Charles Allen, for defendants.

The vendor cannot claim against an innocent purchaser: *Wait v. Green*, 36 N. Y. 556; *Hall v. Hinks*, 21 Md. 406; *Vaughn v. Hopson*, 10 Bush, 337; *Murch v. Wright*, 46 Ill. 487; *Mich. Cent. R. Co. v. Phillips*, 60 Ill. 190; 1 Parsons, Cont. 538; 1 Smith, L. C. (7th Am. Ed.) part 2, p. 1203.

By taking the acceptances the plaintiff waived his lien, while they were running, and should be held to have lost it, so far as the defendants are concerned, who stand somewhat like sureties: *Belshaw v. Bush*, 11 C. B. 206; *Valpy v. Oakley*, 16 Q. B. 949; *Okie v. Spencer*, 2 Whart. 253; *Myers v. Welles*, 5 Hill, 463; *Fellows v. Prentiss*, 3 Denio, 512; *Appleton v. Parker*, 15 Gray. 173; *Green v. Fox*, 7 Allen, 85.

A seller on condition must exact performance promptly, or he will be deemed to have waived the condition: *Lees v. Richardson*, 2 Hilton, 174; *Bowen v. Burk*, 13 Pa. St. 146; *Hennequin v. Sands*, 25 Wend. 640; 2 Schouler, Per. Prop. 302; *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins v. Warren*, 115 Mass. 533; *Freeman v. Nichols*, 116 Mass. 309; *Clough v. Lond., etc., Ry. Co.* L. R. 7 Ex. 35; *Morrison v. Universal Ins. Co.* L. R. 8 Ex. 40.

The measure of damages is not the value of the logs, but the amount of the plaintiff's claim properly reduced by credits, etc.: *Chamberlain v. Shaw*, 18 Pick. 278; *Squire v. Holtenbeck*, 9 Pick. 551; *Kaley v. Shed*, 10 Met. 317; *Perry v. Chandler*, 2 Cush. 237; *Briggs v. B. & L. R. Co.* 6 Allen, 246; *King v. Bangs*, 120 Mass. 514; *Chinery v. Vial*, 5 H. & N. 288; *Parish v. Wheeler*, 22 N. Y. 494; *Johnson v. Stear*, 15 C. B. (N. S.) 330.

LOWELL, C. J. This grant or license or contract purports to give a conditional ownership only to the grantees, of the logs which they should cut under it. The defendants contend that the plaintiff parted with his property, and retained only a lien. This construction is not in accordance with the language of the contract. No doubt his purpose was security, but in attaining it he stipulated that neither the property nor the control of it should pass from him until payment had been made. It was not an ordinary case of sale, but an arrangement covering several undertakings on the part of the grantees, which if they carried out, the property was to be theirs.

The contract is in a form well known in Maine, where the grantees lived, and where standing timber is often sold in this way. Whether the contract was delivered in that state does not appear. It was held in Maine, some 30 years since, that even if the parties to such a contract described the vendor's title as a lien, it was not within the statute concerning chattel mortgages, and need not be recorded; and that the vendor's right was superior to that of a *bona fide* purchaser without notice. *Sawyer v. Fisher*, 32 Maine, 28. In most of the cases since that time the grantor's title is spoken of as a lien, though the contracts usually retain "control and ownership," as in the contract now before us. Since those courts respect a lien as fully as they do the general ownership, the name is immaterial there. I suppose that the contract was drawn up in Maine, and I doubt if it would be a wholly unwarrantable inference that the parties intended it to have the effect which the courts of Maine had so often given to similar transactions. See *Emerson v. Fisk*, 6 Greenl. 200; *Prentiss v. Garland*, 67 Maine, 345; *Crosby v. Redman*, 10 Rep. 306; and cases not concerning timber; *Whipple v. Kilpatrick*, 19 Maine, 427; *Rawson v. Tuel*, 47 Maine, 506; *Bunker v. McKenney*, 63 Maine, 529; *Hotchkiss v. Hunt*, 49 Maine, 213.

The land was situated in New Hampshire, and as the realty was converted into personalty in that state, it might fairly be contended that the law of New Hampshire must

have been in the minds of the parties. I do not know what their laws would say to a lien not recorded; but, as to a conditional sale and delivery, I understand the law of New Hampshire to agree with that of Maine. The early case of *Sargent v. Gile*, 8 N. H. 325, has not been overruled, that I can discover.

It has, however, been held that one who buys chattels in Massachusetts of a vendee whose own title is conditional takes only what the law of Massachusetts would give him, even if at the place where the conditional sale was made the law would have upheld the title of an innocent purchaser. *Hirschorn v. Canney*, 98 Mass. 149. That is this case; and, if the law of this commonwealth is to govern, there is no doubt that it prefers the title of the conditional vendor. The decisions which have followed *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545, are so numerous that I have room to cite but a part of them; some of them were more doubtful in respect to the condition, or its waiver, and others were harder for the purchaser than this case. See *Sargent v. Metcalf*, 5 Gray, 306; *Burbank v. Crooker*, 7 Gray, 158; *Deshon v. Bigelow*, 8 Gray, 159; *Zuchtman v. Roberts*, 109 Mass. 53; *Benner v. Puffer*, 114 Mass. 376; *Salomon v. Hathaway*, 126 Mass. 482; *Kenney v. Ingalls*, Id. 488.

I have examined the authorities cited for the defendants, and they seem to establish that in a few of the states a conditional sale is put on the footing of an unrecorded mortgage, which, by statute, and not always or usually by the common law, would be invalid against a purchaser. The case cited to that effect from the court of appeals of New York has been overruled by *Ballard v. Burgett*, 40 N. Y. 314, and *Austin v. Dye*, 46 N. Y. 500; but I assume that some of the cases express the present state of the law in the states whose decisions they are.

No doubt there is hardship when one is enabled by possession of a chattel to commit a fraud; but this is true of all bailments. If I lend a horse to my neighbor, he may be able to deceive an innocent purchaser. The cases are precisely parallel, for one who has agreed for a conditional purchase

has no more apparent possession than a borrower. The common law, as maintained in a great majority of the states, undoubtedly is that in the absence of actual fraud, or laches, on the part of the true owner, the possessor of a chattel, in a case of this kind, can only dispose of his own title. To this only two exceptions are generally admitted—*First*, that a vendor, who has only the right to elect to avoid a sale, must make his election before the title of an innocent purchaser has accrued; *second*, that if the sale is for cash, the vendor may, by making delivery, be held to waive the condition. This last is a question of fact; but where evidence is very strong, a question of fact becomes one of law, by the courts calling it a conclusive presumption. Many points of law are facts so clearly proved that judges will not permit juries to find the contrary. The legal grounds of these exceptions are obvious.

A passage from Kent, 2 Com. 498, which is often cited in favor of *bona fide* purchasers, will be found, on examination, as I conceive, to refer to a rule in equity. The two cases which he cites on that side are from chancery, and he would not have laid down a general rule of title without a much more careful examination of the authorities. See *Copland v. Bosquet*, 4 Wash. C. C. 588, where Mr. Justice Washington deals with the first case cited by Kent, and denies that there is such a rule at common law; and the opinion of *Loft, J.*, in *Ballard v. Burgett*, 40 N. Y. 314, where the commentary and the cases are fully considered. See, too, on the general question, besides the authorities already referred to, Holmes' note to 2 Kent Com. 498, (12th Ed.); Perkins' note (*d*) to Benjamin on Sales, § 320, (2d Am. Ed.); *Clark v. Wells*, 45 Vt. 4; *Duncan v. Stone*, Id. 118; *Dunbar v. Rawles*, 28 Ind. 225; *Griffin v. Push*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Mo. 24; *Bailey v. Harris*, 8 Iowa, 331; *Robinson v. Chapline*, 9 Iowa, 91; *Baker v. Hall*, 15 Iowa, 277; *Sumner v. McFarlan*, 15 Kan. 600.

I have omitted many decisions in which the contract contained words to express a bailment, such as lending, or letting to hire with a right to buy, because some courts hold

that such words are necessary to the preservation of the vendor's property. Compare *Rose v. Story*, 1 Pa. St. 190; *Becker v. Smith*, 59 Pa. St. 469; *Enlow v. Kleim*, 79 Pa. St. 488. I do not regard the distinction a sound one, because the transaction itself creates a bailment, and there is no good reason why one set of words rather than another should be used to express the idea that the general property remains in the original owner, provided the idea is adequately expressed.

I conclude, therefore, that Ross & Leavitt did not convey an indefeasible title to the defendants.

The referee finds, as a fact, that the acceptances were not taken in payment of the account, and the memorandum on the account confirms this finding. They can, then, have no effect as a waiver of the plaintiff's rights. The defendants stand no better than the original parties in this respect, because the plaintiff had no knowledge when he took the acceptance that the defendants had any interest in the matter. It was the implication of the contract that all the logs were to be taken to Hartford for manufacture, and the plaintiff was not bound to inquire whether this had been done, and was not likely to suspect that it had not been.

The other defences of waiver and estopped are ruled by the referee against the defendants, on the grounds of fact, that the plaintiff acted throughout with prudence and diligence, and realized as much as he could fairly realize, after a default had been made, and was ignorant of the defendants' equities. He is not accountable for sales made by Ross & Leavitt, or the Hartford Lumber Company before they had made default, and before he had any knowledge of the defendants' position. If a demand was necessary, it was made, and the referee finds that no loss occurred to the defendants by any delay of notice, unless the court adopts a different measure of damages from that which he finds to be the true one.

The plaintiff argues that he is entitled to recover the whole value of the logs sold to the defendants. There are cases in which it is held that no credit can be given for part payment in such cases; that as replevin may be maintained for the

chattels, so their whole value may be recovered in trover. *Angier v. Taunton Manuf'g Co.* 1 Gray, 621; *Brown v. Haynes*, 52 Maine, 578; *Duncan v. Stone*, 45 Vt. 118. The rule is harsh, and there would, perhaps, be a remedy in equity; but, unfortunately, the value of a cow, or of a little furniture, is too slight to bear the expense of such a proceeding.

This case differs from those, in the vital particular that the parties here have agreed on the measure of damages. If the plaintiff took the goods by replevin, he must account for their value after paying his debt; and if he recovered the whole in trover, he must immediately pay the surplus to the defendants. I have little doubt that the contract was thus written, or that the form which was followed was adopted for the very purpose of avoiding the injustice which might follow from an enforcement of the strict rule of the common law. And it is effectual for that purpose.

I find no error in any of the rulings of the referee. I agree with him that the interest on the plaintiff's debt should be reckoned at the stipulated rate of 7 per cent.

Judgment for the plaintiff.

UNITED STATES *v.* NYE and another.*

(*Circuit Court, S. D. Ohio.* November 20, 1880.)

1. **CRIMINAL PROCEDURE—COMMON LAW.**—In the absence of statutory provisions the United States courts, in the administration of criminal law, are governed by the rules of the common law.
2. **SAME—INDICTMENT—JOINDER OF OFFENCES—MISDEMEANORS—SECTION 1024, U. S. REV. ST.**—At common law, and by section 1024, U. S. Rev. St., several distinct misdemeanors may be joined in the same indictment.
3. **INDICTMENT FOR MISUSING THE POST-OFFICE—SECTION 5480, U. S. REV. ST.—CONSTRUCTION.**—The latter clause of section 5480, U. S. Rev. St., providing that "the indictment * * * may severally charge offences to the number of three when committed within the same six calendar months," is not a part of the description of the offence; the offence is completely defined in the former part of the section, and this clause relates only to the procedure.

*Reported by Florian Giaque and J. C. Harper, of the Cincinnati bar.

4. CRIMINAL PROCEDURE—MISJOINDER—FELONIES.—At common law, while separate and distinct felonies could not be joined, yet a misjoinder did not destroy the validity of the indictment. The prosecutor might *nolle*, or the court would compel him to elect which of the felonies he would proceed upon.
5. SAME—SECTION 5480, U. S. REV. ST.—Section 5480, U. S. Rev. St., imposes no stricter rule; and where an indictment under that section charges, in different counts, the commission of five separate and distinct offences, the court may, in its discretion, permit the district attorney to *nolle* two of the counts, and proceed upon those remaining.
6. INDICTMENT—MATTER OF FORM—SECTION 1025, U. S. REV. ST.—Any objection to such misjoinder, as matter of form merely, is disposed of by section 1025, U. S. Rev. St.
7. CRIMINAL PROCEDURE—MISJOINDER.—Section 5480, U. S. Rev. St., and 14 and 15 Vict. c. 100, §§ 16, 17, compared.

Motion to Quash Indictment.

Channing Richards, U. S. Dist. Att'y, and *Richard Dyer*, Ass't, for the prosecution.

Yaple, Moos & Pattison, *contra*.

SWING, D. J., (*orally*.) An indictment was returned by the grand jury against the defendant for misusing the post-office. The indictment contains five counts, setting out distinctly five separate offences. The statute under which this indictment was found is the 5480th section, which provides as follows: "If any person, having devised or intending to devise any scheme or artifice to defraud, to be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be punishable by a fine of not more than \$500, and by imprisonment for not more than 18 months, or by both such punishments. The indictment, information, or complaint may severally charge offences to the number of three, when com-

mitted within the same six calendar months, but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device."

Prior to this date there was a separation asked by the defendants, or by one of them, and prior to that the district attorney had come into court, and by the consent of the court had entered a *nolle prosequi* as to two counts in the indictment, leaving but three counts remaining; and there was then a trial had of one of the defendants. A motion to quash the indictment was filed by this defendant, on the ground that the indictment contains five separate and distinct offences, when the statute provides that only three may be included in an indictment. The ground of the motion is based upon the fact that this statute limits the number of separate and distinct offences which may be included in a single indictment; and it further rests upon the idea that the section creating the offence included this addition as to the manner in which the indictment shall be framed, and giving the number of different offences which may be included in it, is descriptive of the offence itself, and that, therefore, it is not within the power of the grand jury to return an indictment containing a greater number of offences than the number prescribed by the statute. If this be so, the grand jury had no power to return the indictment in the form in which it is; the objection would be fatal to it.

I may remark that, in the administration of the criminal law, the criminal procedure and the criminal practice has been greatly modified by express statute, both in England and in various states of the United States, and it has been modified to a very considerable extent by the statutes of the United States. I may furthermore remark that we have no general statute of the United States prescribing criminal procedure, and that in the administration of criminal law, unless there be an express statute to the contrary, we are governed by the general common-law procedure; in the administration of criminal law and in criminal jurisprudence we go to

the common law for the purpose of ascertaining the modes of practice, the modes of procedure, the rights of defendants, the rights of the government, the duty of the court and the duty of the jury, and we administer it according to that. At common law it is admitted that several distinct offences may be joined by different counts in an indictment; that is, where they are misdemeanors only. That is well settled by Wharton's Criminal Law, § 423; Bishop's Criminal Law, §§ 201, 204; *U. S. v. Callahan*, decided in this court, 6 McLean, 96; and the same is recognized in the statutes of the United States, (section 1024, Rev. St.,) which provides: "When there are several charges against any person for the same act or transgression, or for two or more acts or transgressions connected together, or for two or more acts or transgressions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and, if two or more indictments are found in such cases, the court may order them to be consolidated."

The statute under which this indictment is found, then, does nothing more than could have been done at common law in permitting the joinder, but it does limit the number of separate and distinct offences which may be thus joined to three, and provides that they must have been committed within the same six months. This provision, in regard to the number of offences which may be joined, is no part of the statute which creates the offence. The offence is created perfectly, described perfectly, and completed before this clause of the statute is in existence. This clause, then, relates not to the creation of the offence, for it is well said by learned counsel for the defence that we have no such thing in the United States as a common-law offence, or common-law misdemeanors. They are all by statute, and unless they are created by the statute they do not exist. The statute creates the offence, and this provision is no part of the creation of the offence at all. It only relates to the procedure, to-wit, to the manner in which the district attorney shall

prepare his indictments—that he shall not combine in a single indictment more than three separate offences.

I may say, under the former administration of the criminal practice, and in many of the states now, the district attorney prepares his indictments prior to the sitting of the grand jury, and submits the paper thus prepared, or the separate and distinct counts, if he has more than one, with the offences fully described, and the grand jury ignores the whole indictment, or several of the counts thereof, and returns such portions of it as they think may be established by the testimony; but such is not the practice of the United States courts, as I understand it.

This clause only relates to the procedure and punishment; and, while it limits the number of offences which may be joined, it does not, as in some of the English statutes, provide what the procedure shall be in case the limit should be exceeded, or what the consequences of exceeding the limit should be upon the rights either of the government or of the defendant.

It is claimed, however, that the effect of it is to make the indictment absolutely worthless and void. If that be so, then this indictment must either be quashed or held bad upon demurrer. Let us see whether this is the inevitable effect of this statute. At common law there could be no joinder of separate and distinct felonies. That was as well established, at one period at least of the administration of the criminal law, as if there had been an express statute forbidding the joinder of separate and distinct felonies in the same indictment. And yet it was never supposed that the joinder of several felonies destroyed the validity of the indictment. While the courts would not permit the party to be tried for two or more felonies in the same indictment, they would not quash the indictment, but would compel the prosecutor to elect the felony he would proceed to trial upon. The rule is laid down in Wharton, § 216. At common law, in a case of that character, it was always within the power of the prosecutor, where there was an improper joinder, to get clear of the

difficulty and objection by entering a *nolle* as to a part of the counts, or the court would compel him to elect. The rule is clearly laid down by *Parke, J.*, and is found on page 198 of *Bishop's Crim. Procedure*.

Suppose a statute has been passed which in terms provided that an indictment should contain but one felony only, would that change in anywise the rule which governs the criminal procedure where an indictment contained more than one,—would it prevent the prosecutor from entering a *nolle* as to the one or the other count, or would it prevent the court from compelling the prosecutor to elect which one he would proceed upon? Most certainly not. And to permit the prosecutor to enter a *nolle* as to one, or compelling the prosecutor to elect which one of the several counts he would proceed upon, could not be said, in the language of Archibald, (and the only authority referred to by the learned counsel for the defendant,) “to be a striking out of a count, by the court, of an indictment,” which the court would have no power to do. In all cases where there has been an improper number of offences joined in an indictment, the court undoubtedly may, in its discretion, quash the indictment; but it is always addressed to the sound discretion of the court in a case of that character. It may, in its discretion, quash the indictment, or it may permit the prosecutor to *nolle* certain counts, or it may compel the prosecutor to elect which one he will proceed upon, so that the defendant shall in no sense be prejudiced in his defence. That is well settled by *Bishop's Criminal Proc.* 182, 228; *Wharton's Criminal Law*, § 416.

This clause of this section seems to be a transcript, or at least it seems to have followed, 14 and 15 Victoria, c. 100, §§ 15, 16, and 17. Section 15 is in regard to joining several larcenies in a single count in an indictment. Section 16 is as follows: “That it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first

to the last of such acts, and to proceed thereon for all or any of them."

I do not know whether this section has been construed by the English courts. I doubt not but it has, for there may have cases arisen in which more than three separate takings have been charged in the same indictment. It seems to me that the seventeenth section, which follows, would seem at least to indicate that it was in the mind of the legislators that there might be a different effect in case there was a joinder of more counts or acts in a single count than is provided in that section; that is, there might be a different effect upon the indictment than the one claimed by learned counsel for defendant, for section 17 provides: "If, upon the trial of any indictment for larceny, it shall appear that the property, alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not, by reason thereof, be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings."

The first section limits the number which may be included in a single indictment, and if the effect of that limitation is to make void all indictments which should be returned by a grand jury which contain more than the three takings, the number limited, and within a greater period of time than the six months, then there would be no need under any circumstances, although more than three takings in a period of more than six months should be included in a single count in an indictment, of requiring the party to elect, because the proceeding would stop at once. Although it may not be in three different counts setting forth three takings, yet if the evidence shows that there is included in a single count more than three takings, and the takings which are included cover

a period of time more than six months, therefore the case cannot proceed at all, because the statute provides that three may be included and no more, and it must be within the period of six months and no more. But that statute says that if evidence of that character should be developed upon the trial of the case, that the prosecutor then may be required to elect to proceed for such number of takings, not exceeding three, as appears to have taken place within the period of six months.

It seems, from inference at least, that such was the idea of the parliament of Great Britain in the passage of the act of 15 and 16 Victoria.

It is stated, however, by the learned counsel for the defence, that if this procedure is permitted to exist, as it is claimed by the district attorney, that the district attorney and the court would be proceeding to punish alleged violations of this law by a confessed violation on its part, in its proceedings, of the very law which creates the offence. If that were so, we would not for one moment proceed. We would not permit the district attorney to proceed in violation of the law which prescribes the manner in which the procedure shall take place. But the only question for us to determine is this: Is this clause a part of the statute which creates the offence? Without this clause of the section, the statute has created fully and completely this offence. It describes in what it shall consist. It lays down what is prohibited, and what are, in terms, the elements which create the offence. The procedure is no part of an element which enters into the offence.

It is said, again, that by permitting the prosecutor to enter a *nolle* and abandon two of the counts in the case, that it does not appear that these would be the same counts that the grand jury would not have returned; that they might have returned those that were abandoned. But suppose they did, what difference would it make in the rights of the defendant? The grand jury, by this indictment, have said that you are guilty of five different offences; and, if their report is true, there are five different several offences for which the defendant might be prosecuted. Three of them might be joined in

one indictment, and two joined in the other. Suppose they return but the three, would it make any difference to the defendant, in the trial of these three, which of these five should have been included in it? He would have had no voice in it whatever. It is wholly *ex parte*. And a defendant has no voice in what a grand jury shall do in the presentment of an indictment against him. They hear testimony for the government only, and they present whatever the proof satisfies them he has been guilty of. Instead of returning one indictment for three offences in three counts, and another indictment of two counts, they have returned one indictment of five counts. And it is to the benefit of the defendant that they have done so, because this statute disposes of two of the offences which it is charged he has been guilty of. It disposes of any necessity on his part to prepare to meet such additional offences, and says that as to three of them you shall be called upon to answer; but as to the two you shall not.

The defendant objects because the grand jury might have charged in the indictment the two offences omitted from it, and excluded the two of the three which remain. But he has not shown that he is prejudiced by any proceeding of that character, even if it had been so; and he has no choice to say what offences shall or shall not be charged in an indictment. It is for the grand jury to say that, and it is for him to say to the court that you shall not permit me to be prejudiced in anywise in my defence by having a great multitude of offences charged against me, which may vex me in my defence, and confuse the court and jury. And we do not see that the fact that the district attorney has been permitted to enter a *nolle* as to two of the counts, leaving three, would in the least degree tend to vex or confuse him, or deprive him of any rights which he possessed in any form whatever.

If it be objected to as a mere matter of form, the statute of the United States (section 1025, Rev. St.) has provided that "no indictment found and presented by a grand jury, in any district or circuit or other court of the United States, shall be deemed insufficient; nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or

imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

Prior to the passage of this statute we were more strict in the administration of the criminal procedure, and the defendant had a right to take advantage of many defects of mere form in an indictment, and indictments have been quashed on such grounds alone; but now, so far as form is concerned, it shall not operate to the insufficiency of an indictment unless it be to the prejudice of the defendant.

The motion to quash is overruled.

Thereupon counsel for defendant filed a demurrer to the indictment and the court overruled that also.

UNITED STATES v. PERDUE.

(*District Court, W. D. Pennsylvania.* —, 1880.)

1. INDICTMENT—PERJURY.—A bill in equity was filed to restrain the defendant from infringing letters patent for improved methods of exploding torpedoes in oil wells, to increase the production thereof, etc.; and, to sustain an intended motion for a preliminary injunction against him, the plaintiffs took the testimony of the defendant and other witnesses. From the defendant's plain admissions, in his own testimony, it clearly appeared that the plaintiffs were entitled to a preliminary injunction against him, and he never made any resistance to the granting thereof. In the course of his said examination the defendant was interrogated, and testified as to the *ownership* of certain oil wells he was engaged in operating. His testimony touching the ownership of the wells was alleged to be false, and he was indicted for perjury. *Held*, that the defendant's alleged false statements in respect to the ownership of the wells did not tend to prevent the granting of a preliminary injunction, or defeat the due administration of justice, and were immaterial.

Indictment for Perjury.

The defendant was indicted for alleged perjury in his examination before a United States commissioner, taken to be read at the hearing of a motion for a preliminary injunction against him as defendant in an equity suit in the United States circuit v.4,no.10—57

court for the western district of Pennsylvania. In that suit Roberts and wife filed a bill to restrain him from infringing letters patent for improved methods of exploding torpedoes in oil wells to increase the production thereof, and for damages for such infringement. In the course of his said examination the defendant was asked as to the ownership of the oil wells on the Smith farm, and he testified: "I do not own any wells on the Smith farm. * * * I own an interest in one well on said Smith farm. The name of the well is No. 5. J. M. Perdue, William Faas, and, I think, F. A. Perdue, * * * I think own the wells No. 1 and No. 4, Smith farm." This testimony was alleged to be false, and was the perjury assigned; the indictment averring that upon the hearing of the motion for a preliminary injunction it became and was a material question whether the defendant owned any oil wells on the Smith farm. The bill in equity did not concern the ownership of the oil wells on the Smith farm, nor were they or the farm itself named in the bill. Other witnesses, however, had given evidence before the said commissioner—to be used at the hearing of the motion for a preliminary injunction—to the effect that the defendant had been and was engaged in operating the above-mentioned oil wells on the Smith farm, and that torpedoes in infringement of the Roberts patents had been exploded therein. None of these statements were denied by the defendant in his said examination, and he expressly admitted that these wells were under his control and charge. At the trial of the defendant on October 27, 1880, the government offered his aforesaid examination, with evidence of its falsity in this, viz.: that the defendant, at the time of his examination, owned one-half of well No. 1 in his own right, and one-half as trustee of M. A. Long; that he owned three-eighths of well No. 4; that he owned well No. 5 entirely, and three-eighths of well No. 6. The defendant's counsel objected to the evidence on the ground that the ownership of the oil wells was an immaterial matter.

Wm. A. Stone, U. S. Dist. Att'y, and *S. F. Bowser*, for the United States.

R. B. Carnahan and *John M. Thompson*, for defendant.

ACHESON, D. J. The examination of John T. Perdue, the defendant, before United States Commissioner George H. Bemus, on May 22, 1876, did not relate to any question of damages for his infringement of the Roberts patents. That examination was at the instance of the plaintiffs in the equity suit, and was to be used by them to support an intended motion for a preliminary injunction to restrain the defendant from any further infringement of the patents pending the suit. *Prima facie*, the ownership of the oil wells on the Smith farm was an immaterial matter. It is, therefore, for the government to show affirmatively its materiality in order to sustain this indictment. It appears that S. W. Doult, Anthony Kelly, and M. R. Thomas had been examined before Commissioner Bemus, and their testimony tended to show that the defendant had been and was operating wells Nos. 1, 4, and 5, on the Smith farm; that they were employes under him, Kelly, during defendant's absence, being his superintendent; and their testimony also tended to show that in the operation of these wells torpedoes had been exploded in infringement of the Roberts patents. In his examination before the commissioner the defendant did not deny any of these statements of the other named witnesses, and he distinctly admitted that he had an interest in well No. 5, and had charge and control of all said wells. Under the plain admissions of the defendant, in his examination, the plaintiffs in the equity suit were clearly entitled to a preliminary injunction against him, and it does not appear that he ever resisted the granting of such injunction. On the contrary, he permitted a decree *pro confesso* to go against him for want of an answer to the bill. His statements in regard to the ownership of the wells did not tend to defeat the granting of a preliminary injunction, and hence did not tend to prevent the due administration of justice. I hold, therefore, that his alleged false statements in respect to the ownership of the wells were immaterial, and the evidence now offered is rejected.

WASHBURN & MOEN MANUF'G Co. and another v. HAISH.

WASHBURN & MOEN MANUF'G Co. v. HAISH.

(Circuit Court, N. D. Illinois. December 15, 1880.)

1. **ASSIGNMENT OF PATENT—RESERVATION OF TERRITORY.**—An assignment of all right, title, and interest in certain letters patent, "excepting 32 or 33 counties heretofore sold and assigned," is not void for ambiguity.
2. **SAME—SAME—PLEADING.**—Such objection cannot be considered, where a bill for an injunction designated the counties upon which the exception operated, and the defendant neither traversed such allegation in his answer, nor introduced proof tending to show that the territory in controversy was included within such exception.
3. **SAME—RE-ISSUE—PRESUMPTION.**—A re-issue of such patent to the assignee raises a presumption of title in such assignee.
4. **PATENTS—PRIOR USE—PROOF.**—Prior use must be established by a preponderance of evidence in order to defeat a patent, and every reasonable doubt should be resolved in favor of the patentee.
Coffin v. Ogden, 18 Wall. 120.
Webster Loom Co. v. Higgins, 16 O. G. 675.
Howe v. Underwood, 1 Fisher, 175.
Hayden v. Suffolk Manuf'g Co. 4 Fisher, 103.
Goodyear v. Day, 2 Wall. Jr. 283.
5. **INVENTION—DEGREE.**—If any invention is required in the production of a device, the law will not attempt to measure its extent or degree.
6. **SAME—BARBED WIRE FENCE.**—It required such invention to devise and produce a barbed wire which could be practically used for fencing purposes.
7. **SAME—EVIDENCE—USE OF DEVICE.**—The general acceptance and extensive use of a new device is evidence that it was the product of invention.
Smith v. Goodyear Dental Vulcanite Co. 93 U. S. 486.
Eppinger v. Richey, 14 Blatchf. 307.
Isaacs v. Abrams, 14 O. G. 862.
Stanley Works v. Sargeant, 8 Blatchf. 346.
8. **SAME—RE-ISSUE.**—The specifications of a re-issue may be made more full and accurate, but must not be substantially changed so as to describe another device, or cover anything not in the original patent.
9. **PATENT No. 67,117** was issued July 23, 1867, to William D. Hunt, for his method of "providing the wires of a wire fence with a series of spur-wheels;" and *re-issued*, (No. 6,976,) March 7, 1876, to Charles Kennedy, assignee of William D. Hunt, for "a fence wire provided with spurs for the purpose specified." *Held*, that such re-issue was *valid*.

10. PATENT No. 66,182, dated June 25, 1867, issued to Lucien B. Smith, embodied the idea of fixing the barbs by bends in the wire, so as to prevent them from moving lengthwise on the wire. This patent was *re-issued*, (No. 7,136,) May 23, 1876, and contained a claim for the bent wires, as a means of preventing the movement of the barb lengthwise thereon. *Held*, that no objection to the re-issue had been well taken.
11. PATENT No. 74,369 was issued to Michael Kelly, February 11, 1868, for thorns or barbs, fixed rigidly to the wires, so that they could neither slide lengthwise nor revolve upon the wires, (1) by stringing them upon the wires by holes through the center, and then compressing them upon the wire by blows or pressure, or (2) by "laying another wire of the same or different size along-side the thorn wire and twisting the two together." The latter method was first claimed in the *re-issue*, No. 6,902, dated February 9, 1876. *Held*, that such re-issue was *valid*.
12. PATENT No. 84,062, dated November 17, 1868, issued to Michael Kelly, and *re-issued*, (No. 7,035,) April 4, 1876, was for a flat wire, pierced with holes, through which spurs made of pieces of wire, with the ends cut diagonally so as to leave them pointed without further manipulation, were thrust, and for compressing the wire so as to clamp the barb thus inserted in each hole. *Held*, that this patent and re-issue did not show invention, in so far as it claimed for the first time a wire barb made sharp or pointed at both ends by being cut off diagonally.
13. PATENT No. 150,683, issued May 12, 1874, to Joseph F. Glidden, showed a device for keeping the wires of a fence stretched, or spread apart, by means of a slotted tube. It also showed, as part of the mechanism, a barb, made by coiling a short piece of wire between its ends around the fence wire. This feature was first claimed in the *re-issue*, No. 6,913, dated February 8, 1876. *Held*, that such re-issue was *valid*.
14. PATENT No. 157,124, dated November 24, 1874, issued to J. F. Glidden, was for a "twisted fence wire, having the transverse spur wire, D, bent at its middle portion about one of the wire strands of said fence wire, and clamped in its position and place by the other wire strand twisted upon its fellow, substantially as specified." *Held*, that there was nothing left in the line of invention to justify the issue of this patent.
15. INFRINGEMENT. — Defendant manufactured a twisted fence wire, armed with a wire barb, cut diagonally, so as to leave the points sharp, and which was bent in the form of an "S," so as to clasp both wires and extend the sharp points in opposite directions from the wire. *Held*, that such fence wire infringed Hunt's claim for "a fence wire provided with spurs" or barbs; Kelly's idea of a rigid or fixed barb, held in place by the twisting of two wires together; and Glidden's barb, made by bending a short piece of wire around the fence wire so as to leave the two sharp ends projecting to form the spurs or barbs.

In Equity.

Coburn & Thacher, Thomas H. Dodge, Benjamin F. Thurston, Offield & Towle, West & Bond, Lawrence, Campbell & Lawrence, Charles Mason, Hiram P. Dillon, and Miller & Godfrey, for complainants.

George Payson, N. C. Gridley, Munday & Evarts, George Christy, and Albert H. Walker, for defendant.

DRUMMOND, C. J. These are two of a series of 14 cases brought by the plaintiff upon the chancery side of this court, for an injunction and damages by reason of the alleged infringement by defendant of certain patents owned by the complainants, relating to barbed fence wire. By the first suit the plaintiffs allege that they are the owners of the following patents, issued by the United States: (1) Patent No. 67,117, issued July 23, 1867, to William D. Hunt, and re-issued, No. 6,976, March 7, 1876, to Charles Kennedy, assignee of William D. Hunt; (2) patent No. 150,683, issued May 12, 1874, to Joseph H. Glidden, and re-issued, No. 6,913, February 8, 1876, to said Glidden; (3) patent No. 66,182, dated June 25, 1867, issued to Lucien B. Smith, and re-issued, No. 7,136, dated May 23, 1876; (4) patent No. 157,124, dated November 24, 1874, issued to J. F. Glidden,—all of which patents, it is charged, have been duly assigned by mesne assignments to the plaintiffs, the Washburn & Moen Manufacturing Company and Isaac L. Elwood.

The patents involved in the second suit are as follows: (1) Patent No. 74,369, issued to Michael Kelly, dated February 11, 1868, and re-issued, No. 6,902, dated February 9, 1876; (2) patent No. 84,062, dated November 17, 1868, issued to Michael Kelly, and re-issued, No. 7,035, dated April 4, 1876; (3) patent No. 153,965, issued to Charles Kennedy, dated August 11, 1874,—the title to all of which patents has, it is claimed, been, by mesne assignment from the respective patentees, duly vested in the complainant, the Washburn & Moen Manufacturing Company.

The defences set up are—(1) A denial of the patentability of the devices in question, because, from the state of the art, it only requires mechanical skill, and not in-

ventive genius to construct them; (2) a denial of the validity of said patents for want of novelty, on the ground that barbed wire has been publicly known and used long prior to the alleged inventions; (3) a denial of the validity of the several re-issued patents, for the reason, it is insisted, that the inventions now claimed by the re-issues are not found in the original specifications, drawings, and models; (4) that, even admitting the validity of the letters patent, the defendant does not infringe the same, nor any of them; (5) a denial of the complainants' title to the Hunt patent, and their right to maintain this suit upon the title shown.

With regard to the last point named, raising the question of title to the Hunt patent, it is sufficient, we think, to say that the objection comes too late to be considered upon the merits of the cause. In the assignment by Hunt of his interest in the original patent he purports to convey all his right, title, and interest in the said letters patent, "excepting 32 or 33 counties heretofore sold and assigned," not designating the counties thus previously sold and assigned; and the defendant insists that the conveyance by Hunt is so far ambiguous as that nothing passes by this assignment, because it is uncertain what counties were so reserved or had been previously conveyed. We think it enough to say that this reservation is such as is capable of being made certain by competent evidence showing what counties had been actually conveyed by Hunt. The bills allege that certain counties in certain states were the ones upon which the exception operated, and the answers do not traverse or deny this allegation. Besides this, since the assignment from Hunt was made this patent has been re-issued to Hunt's assignee, and we think it must be presumed that the title was fully exhibited to the patent officer at the time of such re-issuance; at least, that a re-issue to the assignee of Hunt raises a presumption of title in the assignee. If the defendant wished to raise the question as to whether the reservation included the territory now in controversy, they should have raised it by their answer, or at least have put in proof tending to show that the title to some

part of the territory involved in this suit was not conveyed by the original assignment from Hunt.

A large mass of testimony has been put into the cases bearing upon the question of novelty, and the state of the art at the time these inventions are claimed to have been made. The defendants have introduced voluminous proofs tending to show the public use of barbed wire for fencing purposes long prior to any of these alleged inventions. We will not take the time to examine those proofs in detail, but dispose of that branch of the case by saying that these proofs fail to satisfy us that barbed wire for fencing purposes had ever been publicly known or used prior to these inventions in such manner as to defeat these inventions for want of novelty. We do not intend to be understood as intimating that the witnesses who have testified to the various instances of the use of barbed wire for fencing purposes have been guilty of intentional false swearing, but simply to say that this proof, which is almost wholly made up of the recollections of witnesses revived after the lapse of many years, and contradicted, as it is in most instances, by the explicit testimony of other equally credible witnesses, leaves so much doubt as to the actual existence of these various barbed wire fences, or any of them, as to make it at least unsafe ground on which to defeat a patent. The rule as to the degree of proof required to defeat a patent by showing prior use is well stated in the following authorities:

In *Coffin v. Ogden*, 18 Wall. 120, the opinion having been delivered by Mr. Justice Swayne, it is said: "The invention or discovery relied upon as a defence must have been complete and capable of producing the result sought, and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him." So, too, Judge Wheeler, in the case of *Webster Loom Co. v. Higgins*, 16 O. G. 675, says: "The burden of proof rests upon the defendant to show beyond any fair doubt the prior knowledge and use set up."

In *Howe v. Underwood*, 1 Fisher, 175, Judge Sprague said: "How invariable is it that after a great invention has been

brought before the world, has become known to the public, and been put in form to be useful, that people start up in various places and declare that they invented the same thing before. The cotton-gin and the ether discovery are illustrations in point; and others of similar character might be added indefinitely. These pretended prior inventors had thought of such a thing; that they had the conception of such a thing, perhaps; but they never carried it to the extent of making it of practical utility, so that the world could obtain possession of it. But when they find that another has completed that which they had begun, they are astonished that they did not see, think they must have seen all that is necessary, and claim that they have invented it. After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy. I think that this is one of the cases in which several of the witnesses have been led into the illusion of believing that they knew before what they have learned or been taught."

The same learned judge, in *Hayden v. Suffolk Manuf'g Co.* 4 Fisher, 103, said: "Where an invention of a useful machine, or structure or improvement in any machine, is shown to have been made, and it is sought to be invalidated by an old machine made years ago, the jury should examine the testimony and the evidence with care and caution, so as to be satisfied that that which is said to have existed was actually and substantially the same. * * * The rule of law is a reasonable one; at all events it is a rule of law that a party that sets up such an old instrument that has passed away has upon him the burden of satisfying the jury, upon a preponderance of evidence, that it is substantially the same as what has taken place before they will set aside the patent."

So, in *Goodyear v. Day*, 2 Wall. Jr. 283, Mr. Justice Grier says: "It is usually the case, where any valuable discovery is made, or any new machine of great utility has been invented, that the attention of the public has been turned to the subject previously, and that many persons have been making researches and experiments. * * * Many ex-

periments may have been unsuccessfully tried, coming very near yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only of the inventor, but by many others. He may have profited indirectly by the unsuccessful experiments and failures of others, but it gives them no right to claim a share of the honor or the profit of the successful inventor."

The testimony as to the state of the art shows that fence wire and wire fences, and wires for such purposes, composed of two or more strands twisted or laid together, were old at the time these inventors entered the field; also that fences had been, long before Hunt's invention, armed with spikes, or other sharp projecting points, for the purpose of making them more effective in resisting the encroachments of animals or other intruders. Indeed, the thorn hedges, which have been used almost from time immemorial, are in one sense only a barbed fence, their effectiveness as a barrier arising mainly from the natural thorns or spurs with which the hedge shrubs are armed. It must be conceded, both from the proofs in these cases, and from those common facts within the knowledge and observation of all intelligent persons, that the idea of furnishing a fence or wall with some kind of sharp spikes or pricklers is old. The ordinary picket fence, the device of spikes on area railings to prevent loungers from leaning against them, the placing of broken glass, pottery, or sharp stones or spikes upon the tops of walls, to protect fruit gardens, are well-known illustrations of what we refer to. The most that can be said of these old devices, as applicable to these patents, is that they narrow the field for the exercise of inventive faculty, and limit the range of the patents.

In this connection it is proper to consider briefly the objection that these devices are not patentable from the fact that, in view of what was well known in the same direction, it did not require inventive genius to make any of the devices involved in these patents, but that only mechanical skill was requisite to adapt old devices to this new use. There is no doubt that a device, in order to be patentable, must be the result of

inventive genius. The mere mechanical adaptation of old things to new uses is not usually invention, unless in combinations; and yet it is extremely difficult in many cases to say just where the inventive faculty asserts itself as the controlling force. And the authorities furnish us no satisfactory test to apply and determine this question. Although there is usually little difficulty in determining, as a matter of fact in each case, whether a device is or is not in some degree the result of invention. If there is any invention required, then the law will not attempt to measure its extent or degree. If, for instance, the proof had shown that wire provided with barbs, spurs, or prickers was a well-known article used for other purposes than fencing, there would be no difficulty in saying that it did not require invention or the exercise of the inventive faculty to substitute it for fencing purposes in place of plain wire which had been used before. But we cannot say that the inventive or creative faculty is not required in devising a mode by which plain fence wire can be armed with spurs so as to make it available as an effective fencing material. The proof does not show that such wire was known and applied to other uses. No one, so far as this record shows, had made or used it before for any other purpose; so that, to our minds, it seems quite clear that it required invention to devise and produce a barbed wire which could be practically used for fencing purposes. In the absence of any other test the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the product of invention; or, as one of the counsel for plaintiff expressed it, "utility is suggestive of originality."

In *Smith v. Goodyear Dental Vulcanite Co.* 93 U. S. 486, Mr. Justice Strong said: "Undoubtedly the result of consequences of a process or manufacture may in some cases be regarded as of importance when the inquiry is whether the process or manufacture exhibits invention, thought, and ingenuity." Webster, on the subject of patents, page 30, says: "The utility of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention; and, since the

one cannot exist without the other, the existence of the one may be presumed on proof of the existence of the other. Where the utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed. We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention. It may, however, always be considered; and, when the other facts in the case leave the question in doubt, it is sufficient to turn the scale."

So in *Eppinger v. Richey*, 14 Blatchf. 307, Judge Shipman said: "Two facts exist in this case: one is that an important improvement has been attained; the second is that the improvement is in a staple article which has been manufactured in this country for a long series of years. * * * The utility of the patented article has been evinced by its large sales. * * * The inventor evidently gave to the public an article which it wanted, and which it had not previously known. Without giving to the general use of the invention as a test of its patentability any greater importance than the supreme court in the case of *Smith v. Goodyear Dental Vulcanite Co.* (above quoted) indicate should be given to this circumstance, I am of the opinion that the facts in the case fully establish the conclusions: (1) That however simple the change in the method of manufacture apparently may have been, yet it was a change which required invention for its accomplishment; and (2) that the improvement resulting from the changed method of manufacture has been so great that the article which is produced is, within the meaning of the patent acts, a new and useful article of manufacture."

Mr. Justice Shepley said, in the case of *Isaacs v. Abrams*, 14 O. G. 862: "A change in the form of a machine or instrument, though slight, if it works a successful result, not before accomplished in a similar way, in the art to which it is applied, or in any other, is patentable."

Judge Shipman said, in *Stanley Works v. Sargent*, 8 Blatchf. 346: "Utility is not an infallible test of originality. The patent law requires a thing to be new as well as useful in

order to entitle it to the protection of the statute. To be new in the sense of the act it must be the product of original thought or inventive skill, and not a mere formal or mechanical change of what was old and well known; but the effect produced by the change is often an appropriate though not a controlling consideration in determining the character of the change itself."

Tested by the rule of utility here suggested, this record abundantly shows that the device in question has been accepted by the public to an extent which has hardly heretofore followed the most successful inventions. Its utility must be considered as a conceded fact. From what has already been developed, it is clear that it has made possible the cultivation of the extensive prairies of the west, the pampas of Brazil, and the steppes of Russia, where, before the introduction of this cheap mode of fencing, it was impossible; and it has, even to a great extent, already superseded the use of wooden fences in the timbered portion of the country; and the question is, to whom but these inventors is the public indebted for this widely-useful device?

The third objection, that the re-issues are invalid, involves a consideration of the original patents in their order, and those patents as they now stand amended and re-issued.

The Hunt patent of July 23, 1867, was for his method of "providing the wires of a wire fence with a series of spur wheels." The re-issued is for "a fence wire provided with spurs for the purpose specified." In other words, what Hunt at first claimed as his invention, and obtained a patent for, was his special mode of arming the wires of a wire fence with spur wheels or barbs; but in his re-issue he claimed as his invention a barbed fence wire as a new article of manufacture, and it is argued that while he may have been the first to place his particular kind of spur or barb on a fence wire, and may have been entitled to a patent for such specific device, yet he nowhere claimed to be the inventor of barbed or spurred wire as such, and therefore his broad claim in the re-issue should not have been allowed and cannot be sustained.

It is not deemed necessary to attempt here any full discussion of the law in regard to the re-issue of patents. It is enough to state, as a general rule, that what is claimed in the re-issue must be found in the original specifications, drawings, and models; that is, "no new matter can be introduced into the specifications." The invention as claimed in the re-issue must be found properly described in the original specifications. In the language of the supreme court in *Powder Co. v. Powder Works*, 98 U. S. 138: "The specifications may be amended so as to make it more clear and distinct; the claim may be modified so as to make it more conformable to the exact rights of the patentee; but the invention must be the same. So particular is the law on this subject that it is declared that no new matter shall be introduced into the specification. This prohibition is general, relating to all patents; and by 'new matter' we suppose to be meant new substantive matter, such as would have the effect of *changing the invention*, or of introducing what might be the subject of another application for a patent. The danger to be provided against was the temptation to amend a patent so as to *cover* improvements which might have come into use, or might have been invented by others, after its issue. The legislature was willing to concede to the patentee the right to amend his specification so as to fully describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake; but was not willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived."

So in *Russell v. Dodge*, 93 U. S. 463, Mr. Justice Field said: "And as a re-issue can only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification could be rendered more definite and certain, so as to embrace the claim made, or the claim could

be so modified as to correspond with the specification." The doctrine of these authorities is that the inventor may, in his specifications on the re-issue, make his description more full and accurate; but he must not substantially change it so as to describe another device, or cover anything not in the original. It would seem from the specification and testimony of Hunt that his idea of the mode of utilizing his device was for the user to purchase the spurs and fix them upon such of the wires composing his fence as he thought desirable. But experience demonstrated that the value of the invention consisted not in teaching each fence builder how to barb his own wire, but in the introduction of barbed wire as an article of manufacture, and in furnishing to the consumer the manufactured article ready for use without further need of mechanical skill, or the use of tools, to fit it for its purpose, beyond the single act of fastening it to the posts. It can hardly need evidence or argument to prove that Hunt's device is much more accurately described as "barbed fence wire" than as a method of barbing wire; and if he was the first to suggest the idea of barbing wire for fence purposes, he had the right to cover that by his patent. The specifications in the original and re-issued patent are substantially the same. No material change is introduced, and whatever change is made is merely that of giving point or direction to the invention now claimed.

The next patent in order of time involved in this controversy is that issued June 25, 1867, to Lucien B. Smith, which, although earlier in matter of date than Hunt's, yet is of later conception, Hunt's invention going back to 1865. The only advance made in the art by Smith's invention was the idea of fixing the barbs by the short kinks, or bends in the wire, so as to prevent them from moving lengthwise on the wire. So far as this device was an improvement on Hunt's, it may, perhaps, be held valid; but it cannot be held to include all equivalent methods of preventing lateral motion, because Hunt had suggested keeping the spurs at a suitable distance apart, by means of "flanges or otherwise." This

Smith patent has been re-issued with a claim for the bent wires as a means of preventing the movement of the barb lengthwise thereon, and we do not see any well-taken objection to the re-issue; but the device seems of little importance in this case, as none of these defendants use it, or its equivalent. We only refer to it as showing another step towards the perfected wire as now used.

It is true that in his specifications, original and amended, Hunt describes his invention as "an improvement in fences;" but this is no part of the substance of his specifications, but only the mere name which he chose to give to his device. Nor do we see any reason why Hunt, having described his method of barbing fence wire, might not have had the broad claim in his original which he obtained in his re-issue; and if he could have had it in the first instance he certainly had the right to it in the re-issue. Hunt, then, for the purpose of this case, must be deemed to have been the first to enter the field as an inventor of barbed wire fencing. Others who followed him may have patents, subject to his, for improvements. His mode of barbing his wire was by a spur-wheel revolving loosely on the wires, or by single spurs strung upon the wire by holes punched through them. These spurs may have been expensive to manufacture, or affix to the wire, but that only went to the practicability of adopting his device in competition with other fencing material then in use, and not to its novelty.

The next patent to be considered in the order of time is that issued to Michael Kelly, February 11, 1868. This patent was for thorns or barbs, fixed rigidly to the wires, so that they could neither slide lengthwise nor revolve upon the wires. Two modes of accomplishing this result are shown: one of stringing them upon the wire by holes through the centre, and then compressing them upon the wire by blows or pressure; and the other by "laying another wire of the same or different size along-side the thorn wire, and twisting the two together;" but no claim was made for the latter mode in the original patent. By the re-issue this feature is made the

fourth claim, and, it seems to me, properly allowed under the law, as it was clearly described and suggested in the original specifications.

The second Kelly patent is for a flat wire, pierced with holes, through which spurs made of pieces of wire, with the ends cut diagonally so as to leave them pointed without further manipulation, were thrust, and by compressing the wire so as to clamp the barb thus inserted in each hole. The only feature of this patent which it is claimed affects this case is that it shows for the first time a wire barb made sharp or pointed at both ends by being cut off diagonally; but barbs had been before this time made sharp by cutting the sheet metal diagonally, and it was certainly no invention for Kelly to point wire by cutting it diagonally after it had become a frequent practice to cut sheet metal in the same way for that purpose.

The Glidden patent of May 12, 1874, showed a device for keeping the wires of a fence stretched, or spread apart, by means of a slotted tube. It also showed, as part of the mechanism, a barb made by coiling a short piece of wire between its ends around the fence wire. This feature was not claimed in the original patent, but is claimed in the re-issue as part of the invention; and, as it is shown in the original specifications and drawings, the patent may be considered as having been properly re-issued to cover this device. The second Glidden patent, of November 24, 1874, is for a "twisted fence wire, having the transverse spur wire, D, bent at its middle portion about one of the wire strands of said fence wire, and clamped in its position and place by the other wire strand twisted upon its fellow substantially as specified." The proof shows that the final form of fence wire and spur which has been adopted for practical use is substantially that shown in the last Glidden patent; but it seems to us there was nothing left in the line of invention to justify the issue of this patent to Glidden as an inventor. The idea of barbing fence wire was Hunt's. The idea of fixing the barb rigidly upon the wire, and holding it in place by another wire twisted upon it, was Kelly's. The wire barb looped over the wire, or one of
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the wires, was that of Glidden's earlier patent; and by grouping all these devices into one finished wire a result is obtained substantially like that shown in the final Glidden patent of November, 1874. There was nothing new in Glidden's last patent, and no room for the claim of invention in the wire therein provided:

In the suits brought by the Washburn & Moen Manufacturing Company and Isaac L. Elwood against Haish, the defendant is charged with infringement of the Hunt patent, the Smith patent, and the two Glidden patents. As already said, we consider the Smith patent and the last Glidden patent as unworthy of further consideration in connection with this case.

The proof shows that the defendant Haish manufactured a twisted fence wire, armed with a wire barb cut diagonally, so as to leave the points sharp, and which is bent in the form of an S, so as to clasp both wires and extend the sharp points in opposite directions from the wire.

Defendant claims that even if the Hunt, Kelly, and Glidden patents are valid, he does not infringe, because his barb differs essentially from the barb of either of the complainants' patents mainly in the fact that it cannot be used except in combination with a wire of at least two strands. Assuming the validity of the re-issue of Hunt, Kelly, and Glidden, there can be no doubt that Haish infringes Hunt's claim for "a fence wire provided with spurs" or barbs. It also infringes Kelly's idea of a rigid or fixed barb, held in place by the twisting of two wires together; and Glidden's barb, made by bending a short piece of wire around the fence wire so as to leave the two sharp ends projecting to form the spurs or barbs.

Glidden's device for forming the barb is undoubtedly a very simple one, and rests very close to the border line between mechanical skill and invention. After Hunt had made barbs by cutting sheet metal into stars, or spur-pointed wheels, to be strung upon the wire by a hole through the middle, the points of the spurs being necessarily obtained by cutting the metal diagonally at the periphery of his wheel, and

after Kelly had shown his two-pointed barb strung upon the wire by means of a hole through the middle, and held in place by another wire twisted upon the thorn wire, it would seem to require but little invention to form the barb by bending a short piece of wire, pointed at both ends, around the fence wire, thereby forming a loop in place of the hole through the barb shown by Kelly. The loop is, when made, only the hole which Kelly punched through his barb; and yet there can be no doubt that the wire barb shown by Glidden is much more readily made and attached to the fence wire than the Kelly barb, which must first be strung upon the wire by passing the end of the wire through the hole before it can be fastened or fixed in place thereon; and, as before remarked, if utility is one of the tests of inventive ability, the proof showing clearly that it has been substantially adopted by all the manufacturers as the method of barbing wire, Glidden's method of forming the barb is not shown by the proof to have been anticipated by either method, and it is clearly new and useful; but, when once the idea of looping or clasping a wire barb around the fence wire has been shown, there was then no invention in such slight changes of the loop as are shown in the Haish barb. It is true, the Haish barb is required by its form to clasp both wires, but Glidden might, without change of the essential principle of his barb, loop it around both wires, if for any reason it was found desirable to do so. The underlying thought or principle of the Glidden barb is that of bending it over or around the fence wire, instead of punching a hole through the barb and passing the fence wire through the hole; and, when once the principle is shown, it is obvious that a great variety of barbs or loops can be made, all of which produce only one result.

This discussion leads us to consider for a moment the various forms of barbs cut from thin or sheet metal. It is manifest that there is and can be no essential difference between making the barb from strips of thin or sheet metal cut diagonally, so as to leave both ends pointed, and wrapping or bending that around the fence wire, and making a similar barb from round wire, as shown by Glidden; nor does the fact

that sheet metal barbs are cut so as to present more than two points when wound around the fence wire, or interlaced between the strands, make them any less an infringement of Glidden's device or relieve them of liability to Hunt.

We, therefore, come to the conclusion that complainants have the right to the relief asked by their bills; the principles we have laid down, in our estimation, fully covering the controverted questions in all the cases before us. Decrees may be prepared finding that defendants infringe, and referring the cases to the master to take account of damages and profits.

Blodgett, D. J., concurred.

WHITE and others v. LEE.

(Circuit Court, D. Massachusetts. December 30, 1880.)

1. LICENSEE—PLEA IN BAR.—A licensee cannot, by plea in bar, raise such issues as are usually made in answer to a suit for the infringement of the patent.

In Equity.

James E. Maynadier, for complainants.

George L. Roberts & Bros., for defendant.

LOWELL, C. J. In this case I decided that the bill, upon its face, was wanting in equity, because it undertook to treat a licensee as an infringer, without showing a renunciation of the license. *White v. Lee*, 3 FED. REP. 222. The complainants have now amended their bill, and charge that the defendant has not furnished the statements and made the payments agreed upon between them, and praying that the defendant may be required to account for all shoes which he has made containing the patented improvements, or any material part thereof. Only one of the two patents mentioned in the lease, or license, is in controversy in this suit.

The defendant pleads in bar, admitting that he took a license, or "lease," under the original patent, No. 190,655, but alleging that the re-issue, No. 8,536, now sued on, was issued without his knowledge or consent; that by the terms

of his license it was mutually agreed that, in case of re-issue, the grant of license should be good thereunder, and the stipulations and agreements of the respective parties should be binding upon them in the same manner, and to the same extent, as though such re-issue had never been obtained; that the patented improvement which he was licensed to use was that recited and referred to in the claim of the original patent, which he sets out *in hæc verba*; that whatever may be the scope of the claims of the re-issue, No. 8,536, he is not answerable thereto, so far as they may be construed for subject-matter different from that embraced in the original claim, but that he has the same rights and is subject to the same obligations as if the re-issue had not been obtained; that he has never failed to keep any of his agreements contained in the lease, but has always kept them. This is set out in detail.

The question intended to be raised by this plea is whether the defendant is bound to account and pay for any shoes which would be an infringement of the claims of the re-issue, but would not infringe the single claim of the original patent. The language of the license is accurately set out in the plea, as far as it goes, but some other clauses may be useful in construing the instrument. The granting part, after referring to the two patents, gives the right to manufacture at the defendant's factory, in Athol, in the state of Massachusetts, and in no other place, during the term of said letters patent, and during any renewal or extension thereof, shoes containing the said patented improvements, or either of them, or any material or substantial part thereof. Then follow the stipulations for royalties, keeping accounts, etc. In the fifth stipulation, on the part of the defendant, he agrees not to contest the validity of the patents, or of any re-issue or renewal thereof, nor the sufficiency of the specifications, "or the validity of the licensor's title, nor the fact of his infringement in the manufacture and sale of said shoes." Thus far it seems to be the natural construction of the lease that if the defendant should be sued for royalties, after a re-issue, he must admit its valid-

ity, and the sufficiency of its specification, and that if he has made "said shoes"—that is, shoes embodying the patented invention, or any substantial and material part thereof—he cannot deny infringement. This last seems a contradictory and insensible stipulation, for the very question of infringement depends upon whether the defendant has made "said shoes." That, however, is not the question at present. Afterwards, there is the mutual stipulation, also numbered 5, quoted in the plea, that in case of re-issue the grant shall remain good, and the stipulations of the parties shall be binding upon them in the same manner and to the same extent as if the re-issue had never been obtained.

The defendant contends that, although he is liable to pay royalties under the re-issue, it is only to the same extent and in the same cases, in all respects, as if the single claim of the original patent were the only claim of the re-issued patent. My impression is that the fifth mutual agreement means that the parties are to remain bound under the re-issue substantially as if that had been the original patent. The idea, if that be it, is awkwardly expressed. Instead of saying, as if the re-issue had never been obtained, it should be, as if it had never been necessary to obtain it. But it seems very improbable that the parties should import into a re-issue a claim which is cancelled and of no effect, and, indeed, which has no existence except by their stipulation. The re-issue is presumed to be for the same invention. If not, it is void. Perhaps the defendant may be estopped to say it is void; but, as he is bound only for "said shoes," he may, perhaps, be permitted to show that the shoes he is asked to account for do not embody the invention, though he cannot say that the re-issue does not. This will depend upon the construction of his fifth agreement. If the re-issue should turn out to be for the same invention, I doubt very much whether the defendant will escape payment if he has used that invention, though it may have been imperfectly claimed at first. In other words, I doubt if the stipulation refers to the claim of the patent as necessarily and without possible amendment embodying the

whole invention. But, whatever may be the meaning of the stipulations in question, the defendant should answer the bill. The plea does not bring the case to a single decisive point. It raises the issues usually made in the answer to a patent suit, namely: upon the true construction of the re-issue, and of the license, and of the original patent; and, upon examination of what the defendant has done, to what extent has he infringed, not technically infringed, but made the patented thing, which, were it not for the license, would be an infringement, and which, under the license, gives the plaintiffs a claim for royalty? The patents are not, as yet, in the record, and I do not see how the issues can be intelligently decided without them. Stated in another way, the difficulty is that the plea admits a liability to account, but furnishes no account, nor the materials for making one. It is not an accounting in equity to say that you have accounted, unless there has been a stated account, which is not the averment here. The defendant was to keep accounts and render statements, and was to put upon each pair of shoes stamps of a certain sort. He says he has done all this; but he ought to say it by way of answer, that the plaintiffs may have the discovery they seek, and that the case may take the usual course and go to a master, if necessary, to have the account properly made up. The points raised in the plea will be equally available to the defendant in answer.

Case to stand for answer.

MURPHY and others v. SCHOONER MARY S. HONTVET.

(District Court, D. New Hampshire. December 21, 1880.)

1. SALVAGE—VALUE OF VESSEL—METHOD OF COMPUTATION.

In Admiralty.

Mr. Hatch, for Murphy and other libellants;

Mr. Batchelder, for Gilson and Campbell.

Mr. Page and *Frank Goodwin*, for claimants.

CLARK, D. J. The schooner *Mary S. Hontvet*, of about 72 tons burden, early in the morning of August 21, 1880, starting on a fishing voyage from Portsmouth harbor to the Western banks, got upon the rocks at "Pull-and-be-damned point" in the river. Her owners, upon being informed of her position, went, some of them, to her assistance. While they were attempting to relieve her with the steam-tug *Bateman*, she slid off the rocks into deep water and began to sink. She had on board 100 hogsheads of salt. The owners then went for another tug and attempted to tow the vessel to Newcastle, but could not do so, and she sank in the river with only her mast-heads out of water.

In the afternoon of the same day she began to float, and to drift with the tide towards the ocean. The owners were aware of this, but made no effort, with the *Bateman* or otherwise, to hold her, or to bring her to shore. Late in the afternoon of the same day Murphy, one of the libellants, having in charge a small schooner, called the *Little Kate*, which *Mr. Tredick*, one of the claimants, owned, proposed to *Mr. Tredick* to go with him in quest of the *Hontvet*. This *Mr. Tredick* declined to do. Murphy, however, taking with him *Mr. White*, another libellant, went to search after the abandoned vessel with the *Little Kate*. They found her about half way between "Whale's-back" and the shoals, some three and a half miles at sea. She was on her side, rolling in the seaway, with her masts rising and falling, and the sea making a breach over her. There was a thick fog, with the wind to the south-east, some "chop," but not a heavy sea. After sailing round the *Hontvet* two or three times to find a place

to "make fast" to her, Murphy and White succeeded in attaching a line to her mast-head, and then anchored the Little Kate to hold her. They placed a light on the rigging of the Little Kate and commenced to halloo for assistance. Somewhere about midnight the four other libellants, Gillis, Jameson, Byrns, and Russell, came to the wreck in two dories, directed by persons on board a vessel in the vicinity who had heard the outcries of Murphy and White on board the Little Kate.

Gillis was the commander of the schooner Nichols, then in Portsmouth, and it was agreed between Murphy and White and these four men that they should go in and "come out" with the Nichols and help save the Hontvet, and share alike in the salvage. After they had gone sometime, Gilson and Campbell came to the wreck, and Murphy, anxious for the appearance of the Nichols, procured them to go into the harbor, and, to use his expression, "hurry her up." They did so, and came back and reported that the Nichols was aground, but would come out as soon as she floated with the tide. The Nichols afterwards came out as agreed, and they commenced to save the Hontvet. Upon consultation it was thought best to strip her, and that was done. About daylight James Davidson went to the wreck, and he assisted in stripping the wreck and in towing in the rigging and masts into the harbor. Early in the morning of the twenty-second of August the steam-tugs Ann and Bateman came to the wreck, but no assistance was asked of them, and none was offered or declined,—the Nichols not having then arrived out. She came out later. On the afternoon of Sunday, the twenty-second of August, one of the owners of the Hontvet having previously passed by her, on his way to the shoals, without offering any assistance or giving any directions or advice, the steam-tug Sampson came to the wreck, and Murphy hired her commander to take the masts of the Hontvet out of her, that she might "right" herself and be towed more easily and safely. Not being able to pull them out the Sampson broke them off, and afterwards, at the request of Murphy, assisted in towing the Hontvet to Newcastle and putting her in safety

on the shore,—the Nichols and Little Kate and Davidson assisting to tow in the masts and rigging, but being unable of themselves to tow the vessel without the aid of the Sampson. Murphy engaged the Sampson at a stipulated price.

So far as the libellants Murphy, White, Gillis, Jameson, Byrns, and Russell are concerned, this is very clearly a case of salvage service, and is so admitted by the counsel for the claimants. The main question is, what shall be allowed for the service? and this depends largely upon the value of the property saved. Upon this point the testimony in the case leads to no precise or very satisfactory result. Mr. Littlefield, who was called to look at the vessel soon after she was brought in, says in his opinion she was worth, as she then was, \$1,500. He is a ship-builder, and competent to testify; but his judgment is not conclusive, and, tested by other methods of ascertaining her value, cannot be received as precisely accurate. Mr. Stimpson, another ship-builder, and who worked on the vessel when she was built, says she was an "A 1" vessel, 72 tons burden; that she cost when new \$6,500, and that in four years she would deteriorate 30 per cent., making her value at the time she went ashore some \$4,610. But there was evidence that the cost of building vessels had diminished since this vessel was built, and that there should be a deduction on that account. Precisely how much the cost of building vessels has lessened does not appear, but Mr. Littlefield says he thinks this vessel could not be built for \$4,000 or \$5,000. This would show a shrinkage of from 25 to 30 per cent. Deducting 25 per cent. on this account from \$4,600 would leave the value of the vessel when she went on to the rocks \$3,450. Add to this sum the value of the masts, sails, and rigging, and the value would approximate the value put upon the vessel by the owners when insured, to-wit, \$5,000.

Taking the value of the vessel when she started on her voyage as \$3,450, by this method of estimating, and deducting \$344.29, cost of repairing vessel's hull after she had been on the rocks, and been brought into Newcastle, and we have the value of the vessel, \$3,105.71. From this sum is still another

deduction which should be made, for the shrinkage of the value of any vessel of much size which has been ashore on the rocks. How much this should be in this case does not appear; not very large, however, as the repairs needed were not large, and the apparent damages small—say \$300. This leaves the value of the vessel, when rescued and brought on shore, \$2,805.71. Between this valuation and the estimate of Mr. Littlefield (\$1,500) there is a difference of \$1,305.71. One is nearly twice as large as the other, and they can hardly be reconciled. If the one is too large, it is equally certain the other is too small.

There is still another method of approximating the value of the hull when saved. The owners insured the vessel for \$5,000, and that was the value they placed upon her for insurance when wrecked. Mr. Tredick says "she was in good condition." He was willing to pay the premium for that amount of insurance. But it is now said that valuation was too high. Admit that it was so, and deduct 10 per cent. for such over valuation, (\$500,) that leaves her value, with rigging, at \$4,500; deduct \$1,500 for the rigging, which is its cost when new, as appears from the testimony of Mr. Tredick, and you have the hull \$3,000 when the vessel sailed. She was injured on the rocks to the amount of \$344.29, as shown by bill of repairs. This leaves her value at \$2,655.71. Deduct, again, \$300 for injury to her reputation and market value, and you have \$2,355.71, the value of the hull as saved. This sum is not very far from midway of the others. If we add the three results, viz.:

\$2,805	17
1,500	00
2,355	71

\$6,660 88

Divide by three and we have an average of \$2,220.44. This is probably not very far from correct, and I have concluded to call the value of the vessel when saved \$2,200. The value of the other articles saved I find to be \$550, making a total of \$2,750.

I find that the vessel had been abandoned by the owners, and was at the mercy and control of the wind and waves when found by Murphy and White; but I do not find that the salvage service was very dangerous to the salvors. I allow out of the sum of \$2,750 one-quarter part—\$687.50—as salvage. Out of this sum I allow James Davidson \$25 as salvor, and Frank Gilson \$15, leaving a balance of \$647.50 for the libellants. I have allowed the salvors a little more in this case than perhaps I should have done had the owners made more effort or shown more anxiety to have saved their vessel than they did. Tredick was the agent of the owners and manager of the Hontvet, yet he allowed her to drift to sea without attempting to stop her; he refused to go with Murphy to find and rescue her, and did not see her again till she was landed on the shore at Newcastle. Anderson, another owner, made his dory fast to her mast-head as she floated, and allowed her to tow him to the vicinity of Kitt's rock, and then he declined her further company and returned. Rider, another owner, on his way to the shoals next day, saw the vessel, and the men on board or about her, trying to save her, but lent no assistance.

I do not find that Murphy or his assistants were guilty of any malfeasance, or of doing any damage, for which their salvage service should be forfeited or diminished. It might have been possible that the Bateman could have towed the Hontvet into harbor with her masts in her, but it must have been an undertaking of considerable risk and much difficulty. It would, in my judgment, have been more prudent to have taken the masts out, even with the Bateman to tow her in. If the Batemen had offered, or had told Murphy that he could tow the vessel in as she was, instead of a *quasi* threat that he would dispossess him of the vessel which the owners had abandoned and which he had found at sea, there might have been some ground for the suggestion that he unnecessarily damaged the vessel, but I think there is very little now.

Decree for libellants, with costs.

THE SHIP SHAND.

(District Court, S. D. New York. November, 1880.)

1. DAMAGES—REFERENCE—PRACTICE.

In the opinion under which a final decree in admiralty is entered, determining the question of liability, and directing a reference to a United States Commissioner to ascertain the amount of damages, a statement by the court as to a fact affecting the amount of damages, and not material to a determination of the question of liability, is not binding, and does not preclude either party from introducing any competent evidence before the commissioner touching the extent of the damage.

In Admiralty.

R. D. Benedict, for libellant.

T. E. Stillman, for claimants.

CHOATE, D. J. In this cause, which was a suit to recover for non-delivery of cargo according to terms of bills of lading, the libellant has had a decree on the ground that the master and crew of the vessel were negligent in not protecting her cargo of sugar against damage which threatened to injure it through the known leaky condition of the vessel on her arrival at her place of discharge. A reference was ordered to compute the libellant's damages. It appeared upon the trial that the cargo had already sustained damage by sea water, which was properly to be attributed to a peril of the sea, and the evidence tended to show that the water had been, before the arrival of the ship at her pier, more than six feet above the bottom of the cargo of sugar. The principal charge of negligence, on which the liability of the ship for subsequent damage was sought to be based, was in suffering a steam-pump employed by the master to pump the ship out to stop during the night of the twenty-eighth of December, so that in the morning the ship was again flooded with sea water. In the written opinion of the court occurred this passage with reference to the condition of the ship on the morning of the 29th: "The lower hold, where the sugar was stowed, was flooded. The water had risen higher among the mats of sugar than it had ever been before." Such seemed then to me to be, and still seems to be, the proper inference to be drawn

from all the testimony bearing upon the question as to the height to which the water rose among the bags of sugar in consequence of this flooding. The controlling circumstance in reaching this conclusion was the fact that only about 1,300 bags of dry sugar came out of the ship, while the evidence on both sides tended strongly to show that there were before the flooding a much larger number of dry bags in the vessel. Upon the reference, however, it has been claimed by the libellant that it is a point determined in the cause that the water did rise higher among the bags of sugar on the morning of the 29th than it had ever been before. The claimants, on the other hand, desire to introduce evidence before the commissioner tending to show that the water did not rise so high on the morning of the 29th as it had been previously; and this is an application to the court for a reconsideration of this finding of fact, or to ascertain whether this question is open upon the reference. The only question relating to this flooding of the ship, really before the court for determination upon the trial, was the question of the ship's liability for the damage occasioned thereby. The question of amount of damage was reserved, and intended to be reserved, for the reference in accordance with the almost invariable practice of the court. In discussing the proofs, as bearing on the question of liability, a narrative of events was given in the opinion delivered, in the course of which the remark above quoted was made. So far as the question of liability for the ensuing damage was concerned, it was immaterial whether the water rose in the cargo on the morning of the 29th one foot or seven feet. The result would and must have been the same. While witnesses were examined by both parties as to the height of the water, and while the effect of the evidence in that respect was very carefully commented on by libellant's counsel, and somewhat, also, by claimants' counsel, as appears by his brief, yet I am satisfied that this question, which is chiefly important as affecting the amount of damages, was not submitted, nor understood by the court to have been submitted, upon the trial as a point to be then conclusively determined, or that any question involved in the

question of the amount of damage was withdrawn from the usual mode of trial by reference. The claimants were not called upon on the trial to bring out the strength of their case on this point. As the height of the water was not material to the determination of their liability, which was the question tried, they are not concluded by the inference drawn by the court from the proofs as to that point. This observation in the opinion might well have been omitted as wholly unnecessary to the point to be decided. Neither the decree nor the minutes nor the briefs of counsel show any stipulation, nor anything equivalent to a stipulation, or an order of the court that this question should be passed on at the trial. The opinion expressed on the point must therefore be regarded as at most a *dictum* expressing the opinion of the court on the proofs as they then stood, not in any way precluding either party from introducing any competent evidence before the commissioner touching the extent of the damage caused by the flooding of the ship on the night of the twenty-eighth of December.

The commissioner will proceed in accordance with this decision.

THE MEMPHIS & ST. LOUIS PACKET CO. v. STEAM-BOAT H.
C. YAEGER and others.

(District Court, E. D. Missouri. November 23, 1880.)

1. COLLISION—DAMAGES. — The expenses from the port of departure to the place of collision, and of return to the port of repairs, will not be allowed in damages.

In Admiralty. On exceptions to commissioner's report.

Noble & Orrick, proctors for libellant.

Given Campbell, proctor for libellee.

TREAT, D. J. The court having heretofore decided that the collision was one of mutual fault, the only question remaining was to determine the amount of damages, and

apportion them accordingly; that is, a moiety of the aggregate against each of the parties. Exceptions by libellant are that the expenses from port of departure to place of collision and return to port of repair (which is port of departure) have not been allowed. The rule is "*restitutio in integrum*;" but, to ascertain under that rule what is allowable, the courts have been compelled to exclude the inquiry into speculative or possible profits.

It may seem that the full restitution against a maritime tort should cover all the expenses of a voyage; yet it may be that the voyage was a losing one, and hence its interruption was no actual loss. Where loss of freight occurs,—that is, net loss,—the amount may be included; but there is no such item here. Hence the libellant's exceptions must be overruled. *The Baltimore*, 8 Wall. 377; *The Cayuga*, 14 Wall. 270; *The Atlas*, 93 U. S. Rep. 302.

None of the cases cited do more than state the general rule; yet that rule, in its application, must control. Respondent, on the other hand, excepts on the ground that the demurrage is fixed at too high a rate. An examination of the testimony shows that \$100 per day would be a fair rate for a charter-party, instead of \$140 per day.

The exceptions of respondent are sustained; and, instead of sending the cause back to the commissioner, the amount of damage will be reduced accordingly.

NOTE. See *Guibert & Son. v. The British Ship George Bell*, 3 FED. REP. 581.